IN THE

Supreme Court of the United States

October Term, 1951.

No. 395.

RICHFIELD OIL CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA.

APPELLANT'S OPENING BRIEF.

This is a direct appeal by Richfield Oil Corporation, defendant below, from a judgment of the District Court of the United States for the Southern District of California.

Opinion Below.

The Opinion of the District Court [R. 71-100] is reported in 99 Fed. Supp. 280 (D. C. Cal., 1951).

Jurisdiction.

The Judgment of the District Court against appellant was entered on August 2, 1951. [R. 165-171.] Petition for Appeal [R. 193-4] was filed and the appeal allowed [R. 213-4] on September 4, 1951.

The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended

(32 Stat. 823; 36 Stat. 1167; 58 Stat. 272; 62 Stat. 989; 15 U. S. C. A. 29).

The following decisions sustain the jurisdiction of the Supreme Court to review the Judgment on direct appeal in this cause: *Interstate Circuit, Inc. v. United States,* 306 U. S. 208; 83 L. Ed. 610; *United States v. Crescent Amusement Co.,* 323 U. S. 173; 89 L. Ed. 160; *Associated Press v. United States,* 326 U. S. 1; 89 L. Ed. 2013; *United States v. Yellow Cab Company,* 338 U. S. 338; 94 L. Ed. 150.

Probable jurisdiction was noted on November 13, 1951.

Statutes Involved.

Section 1 of the Act of July 2, 1890, as amended (26 Stat. 209; 15 U. S. C. A. 1), commonly known as the Sherman Act, is as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . ."

Section 3 of the Act of October 15, 1914, as amended (38 Stat. 731; 15 U. S. C. A. 14), commonly known as the Clayton Act, is as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price,

on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Statement.

1. HISTORY OF THE LITIGATION.

The United States brought this suit in equity in April, 1947, to enjoin alleged violations by appellant, Richfield Oil Corporation (herein called "Richfield") of Section 1 of the Sherman Act and Section 3 of the Clayton Act in its contracts and agreements with service station operators and dealers. [R. 1-11.]

The case involves two entirely separate and distinct types of service stations:

(1) L. O. STATIONS—These are stations owned by Richfield or leased by Richfield under long-term lease from the owner thereof.[1] The L. O. station is leased from time to time by Richfield to an operator (a person other than the owner-lessor) under a written lease agreement for an indefinite period of time, subject to termination by either Richfield or the L. O. operator on twenty-four hours' notice. [Stipulation of Facts—Ex. A; R. 399-400, 762.]

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[1]These stations are commonly known and designated by Richfield as "L. O. stations" (L. O. referring to "leased out"); and the operators installed in such stations by Richfield from time to time are known and designated as "Operators."

(2) DEALER STATIONS—These are stations owned by the dealer or leased by him from a lessor other than Richfield. The dealers with whom Richfield has made contracts fall into two separate categories named respectively after the identifying form numbers of Richfield's applicable printed contract forms, to wit, (a) the 337 Dealer,[2] and (b) the 3-C Dealer.[3]

Richfield has entered into, with each 337 and 3-C dealer, a written sales contract providing for the sale of specified quantities of petroleum products.[4] With certain of the 337 dealers, Richfield has made written painting agreements providing for the painting by Richfield of their stations. As a part of the transaction with the 3-C dealer, Richfield has leased his station and has subleased it back to him. [Stipulation of Facts—Ex. A; R. 401-4, 762.]

In support of its charges concerning both types of stations, the government alleged the following: that Richfield

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[2]The sales contract between Richfield and any service station dealer owning or so controlling a service station is commonly known and designated by Richfield as a "337 Deal"; and such service station dealer is known and designated as the "Dealer" or the "337 Dealer."

[3]The type of transaction between Richfield and any service station dealer owning or so controlling a service station which involves a sales contract, a lease to Richfield by the dealer and a sublease by Richfield to the dealer is commonly known and designated by Richfield as a "3-C Deal"; and such service station dealer is known as the "Dealer" or the "3-C Dealer."

[4]Prior to August, 1948, Richfield made sales contracts with 3-C dealers on an entire requirements basis; but since such time Richfield has made no sales contracts on other than a specified quantity basis. By negotiation with the 3-C dealers, Richfield secured the change to a specified quantity basis of all but four contracts made before August, 1948. [Stipulation of Facts, Ex. A; R. 402, 762.]

has entered into "contracts, consisting of written and oral agreements and understandings . . . between itself and independent service station operators" [Compl. par. 16; R. 6] in the states of California, Oregon, Washington, Nevada, Arizona and Idaho; that the written agreements consisted of written service station leases, sales contracts and painting agreements [Compl. pars. 17-19; R. 6-7]; that in addition to such written agreements, Richfield has entered into "supplemental *oral* contracts, agreements and understandings with *each*" of the approximately 2600 "independent service station operators,"[5] which oral contracts restrict the brands of petroleum products and automotive accessories handled by the independent service station operators to those brands designated and approved by Richfield [Compl. pars. 18 and 19; R. 6-7]; and that Richfield required such independent service station operators to enter into and adhere to the oral contracts by threats of cancellation of the written contracts, by inspection, policing and supervision of the activities and sales of the independent service station operators at the 2600 service stations and by actual cancellation of the written leases or written sales contracts of those independent operators who refused to conform to the oral contracts. [Compl. par. 20; R. 7-8.] It was alleged that these contracts unreasonably restrained and substantially lessened competition in interstate trade and commerce in petroleum products and automotive accessories. [Compl. par. 16; R. 6.]

The complaint did not charge a monopoly or attempted monopoly by Richfield in any line of commerce. The complaint did not charge any conspiracy or combination.

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[5]The 2600 "independent service station dealers" so referred to include (a) the L. O. operators and (b) the Dealers, both 337 and 3-C. [Compl. pars. 18-19; R. 6-7.]

The issues raised by Richfield's responsive pleadings differed as to (1) the L. O. stations, and (2) the Dealer stations.

With respect to the *L. O. stations,* Richfield denied that the L. O. operators are "independent" service station operators under the facts and circumstances admitted and alleged therein. Richfield admitted and alleged that each of the L. O. stations was acquired or constructed by Richfield as an outlet for the sale of Richfield's petroleum products to the motoring public; that each L. O. operator has been selected and trained by Richfield and has been permitted by it to occupy Richfield's L. O. service station and use its land, buildings, facilities and equipment on a temporary basis, subject to termination on twenty-four hours' notice by either party; that the occupancy of the L. O. service station by any such operator is upon the understanding that Richfield has the right to designate, as a condition upon the operator's continued occupancy thereof, the manner of such operator's maintenance and operation of the station, including, among other matters, the appearance and cleanliness thereof and the nature and extent of the services to be rendered to the motoring public, and upon the understanding that only Richfield's products be handled or sold in such service station, subject to such exceptions as Richfield might permit from time to time. Richfield alleged that the relationship between Richfield and any such operator is analogous to the relationship of agency or to the relationship of employment for the purposes of and within the scope and meaning of the Sherman Act and the Clayton Act, respectively; and that under the facts and circumstances so admitted and alleged, the trade, custom and business of each of Richfield's L.

O. stations, as conducted by any such operator, is Richfield's trade, custom and business and is not the subject matter of competition. [R. 23-4.]

With respect to the *Dealer stations* (both 337 and 3-C), Richfield denied any contracts, agreements or understandings, written or oral, with the independent service station dealers by which any of such dealers is required to handle only the brands of petroleum products or automotive accessories designated or approved by Richfield, or is required to acquire automotive accessories from sources designated by Richfield. Richfield denied that it has required such dealers to handle only Richfield's petroleum products or Richfield's "sponsored" automotive accessories, either by threats of cancellation of contracts or by inspection, policing or supervision. Richfield denied that it has cancelled the written agreement of any independent service station dealer because of the refusal of such dealer to conform to any such alleged oral contract, agreement or understanding. [R. 18-20.]

Richfield further denied that its contracts unreasonably restrain or substantially lessen competition in interstate trade or commerce.

The case was tried in the District Court during May and June, 1951. On July 2, 1951, the District Court filed its Opinion. [R. 71-100.] The Findings of Fact and Conclusions of Law herein were filed on August 2, 1951 [R. 133-165]; and the Judgment herein in favor of the government was filed and entered on August 2, 1951. [R. 165-171.] Therein it was determined that Richfield's agreements with the L. O. operators and the Dealers (both 337 and 3-C) violate both Section 1 of the Sherman Act and Section 3 of the Clayton Act.

Richfield thereafter filed a motion under Rule 52, F. R. C. P. to amend the Findings, Conclusions and Judgment. [R. 172-193.] Such motion was denied by the District Court on August 17, 1951. [R. 193.]

We believe it material to the consideration of the questions here presented to set forth in this statement the following salient facts, all of which are established by uncontradicted evidence, excepting in those few instances wherein attention is expressly called to conflicts.

2. RICHFIELD'S TWO METHODS OF MARKETING.

Richfield makes its petroleum products available to the motoring public by marketing the products on two entirely separate levels: (1) by soliciting the business of dealers who are established in their own service stations; and (2) by having Richfield's own service stations as outlets to supplement the volume of products sold by it to the dealers.

The dealers either own their respective places of business or lease them from a lessor other than Richfield [Stipulation of Facts—Ex. A; R. 401-2, 762] and are referred to as "independent service station dealers." [R. 1566.] They are considered to be Richfield's customers. [R. 1628, 1142-3.]

There is intense competition for the business of independent dealers among the various oil companies distributing petroleum products. Richfield continuously solicits the business of the dealers but constantly loses some of such customers to competitors. [R. 1580-1, 1619; also Ex. X, R. 515, 1762.]

Richfield's reason for establishing and having L. O. stations is its experience that it cannot depend upon a suffi-

cient volume of business from independent dealers to maintain a stable market for the products produced by it. [R. 1580-1.]

There are other factors hereinafter discussed which increased Richfield's need for service station outlets in the post-war period and led to a large expenditure for the purchase of land and the erection of L. O. stations. [R. 1581-4.]

3. RICHFIELD'S MARKETING ORGANIZATIONS.

Richfield's contacts and relationships with the independent dealers and with the L. O. operators differ to such an extent that Richfield has maintained, within its marketing department, two separate and parallel organizations[8] to deal with them respectively.

The *sales organization* consists of seventy-five (75) men classified as salesmen who are responsible in Richfield's three divisional territories to assistant division

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[8]In passing on those errors assigned to certain findings of fact pertaining to Richfield's relationship with the 337 and 3-C Dealers (as for example, Assignment II(1)(g) [R. 206], directed to the finding that Richfield inspected, policed and supervised the activities and sales of 337 and 3-C dealers) it will be helpful and at times necessary to ascertain whether the particular testimony asserted by the government to support a finding was given by or with reference to a salesman or a merchandiser.

There was not absolute consistency by witnesses in use of terminology, *i. e.*, to "dealer" to refer to the independent dealers only, and to "operator" to refer to the operators of Richfield's L. O. stations only. The word "dealer" was used on occasion by some witnesses to refer to the L. O. operators rather than to the independent dealers. For example, see Footnote 78.

Accordingly, some testimony ostensibly indicating certain practices with "dealers" will, on analysis in the light of the difference between the sales and merchandising organizations, be shown to relate only to L. O. stations and their operators and not to 337 or 3-C Dealer stations.

managers in charge of "operations." The salesmen's functions and responsibilities are limited to the solicitation of the business of the independent dealers and of commercial and consumer customers. The salesmen have nothing to do with the L. O. stations or the L. O. operators. [R. 1565-6, 1571-4. See the Job Classifications and Work Habits of the Salesmen—Exs. N-3, N-4; R. 478A-487, 1573.]

The *merchandising organization* consists of one hundred ten (110) men classified as merchandisers who work in the three divisions under assistant division managers in charge of "merchandising." The functions and responsibilities of the merchandisers are limited to the operation of the L. O. stations. The merchandisers have nothing to do with the independent dealers, either 337 or 3-C. [R. 1565-6, 1571, 1574, 1718. See the Job Classifications and Work Habits of the Merchandisers, Exs. N, N-1 and N-2; R. 464A-478, 1569, 1570-1.]

4. DETAILED STATEMENT CONCERNING THE L. O. STATIONS.

A. Nature of L. O. Stations.

The L. O. stations are of four types:

(a) Those in which both the land and improvements are owned by Richfield;

(b) Those in which Richfield owns the improvements on leased land;

(c) Those as to which Richfield has arranged with the property owner to improve the site with a station conforming to Richfield's design and specifications which is then leased to Richfield; and

(d) Leased stations, including those erected by a property owner for Richfield, but not conforming to its specifications. [R. 1566, 1755.]

Of the 1343 L. O. stations held by Richfield as of December 31, 1950, in excess of 81% thereof were originally created as service stations by Richfield and had never theretofore been used or equipped as service stations handling any petroleum products. [Ex. W; R. 515, 1756.]

B. Comparative Statistics re L. O. Stations.

The total number of L. O. stations held by Richfield as of December 31st of each year from 1938 to 1950, inclusive, is set forth in Exhibit M-4. [R. 432-6, 1557.] As of December 31, 1948, Richfield's L. O. stations constituted 3.28% of the total number of service stations in the area in which Richfield does business. [Ex. M-4; R. 432-6, 1557.]

The volume of gasoline sold at Richfield's stations by years and comparisons of such volume with the total sales by all companies to all stations and with the volume of taxable sales by all companies in the same marketing area are set forth in Exhibit M-5. [R. 437-40, 1559.] For example, for the year 1950, the volume of gasoline at the L. O. stations was 4.9% of the volume sold by all companies to all stations and was 3.18% of the taxable sales of motor fuel by all companies.

More relevant comparative statistics[7] are shown in the comparison annually of gallons sold at Richfield's L. O.

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[7]The comparison of sales to the quantity available for sale was considered to be most relevant in *U. S. v. Columbia Steel Co.*, 334 U. S. 495; 92 L. Ed. 1533 (1948).

stations to total gallons of gasoline manufactured and available for sale in Richfield's marketing area. [Ex. Z; R. 517, 1768.] For example, for the year 1950, gasoline sold at Richfield's L. O. stations constituted 2.71% of the total gallons of gasoline manufactured.

C. Richfield's Business Purpose in Acquiring and Having L. O. Stations.

Richfield has established L. O. stations to provide a stable outlet for its petroleum products to supplement the quantity of petroleum products which it is able to sell to the independent dealers. [R. 1580-1.]

In addition to the loss of business of independent dealers due to the competition of other companies [R. 1580-1], other business factors contributed to an increase in Richfield's need for additional service station outlets. They consisted of (1) Richfield's enlarging, at the request of the government during World War II, by 32½% (to wit, 10,705 barrels per day) the capacity of its refinery facilities for the manufacture of gasoline [R. 1581-2, 1787-93; Exs. AE, R. 27-44, 1787; AE-1, R. 44-71, 1787; AE-2, R. 26, 1789; AE-3, R. 27, 1789; and AF, R. 535, 1793]; (2) the discontinuance by the government of large purchases of gasoline from Richfield immediately following the end of the war, at which time the government's purchases were cut down from 17,000 barrels to 2,000 to 3,000 barrels per day[8] [R. 1581-2, 1793-4; Ex. AG,

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[8]This reduction of 14,000 barrels per day is the equivalent of 17½ million gallons of gasoline per month or more than the sales potential of 2500 L. O. units, calculated at the average gallonage of an L. O. unit during the war of 6800 gallons per month. [R. 1616, 1703.]

R. 536, 1794]; (3) the discovery of new oil fields [R. 1582]; and (4) the increase in demand for petroleum products due to the increase in population. [R. 1582; Ex. M-13, R. 463-4, 1561.]

D. Source of Operators and Manner of Their Selection for Installation in the L. O. Stations.

As a rule, Richfield has a waiting list of applicants for its L. O. stations. [R. 1586.][9] The merchandisers are instructed to procure prospective L. O. operators from a number of different sources including employees of other L. O. operators, advertising in newspapers, and contacting businessmen in the community. [R. 1719.]

Few, if any, L. O. operators had been independent dealers in their own stations prior to becoming L. O. operators in Richfield's stations. [R. 1586-7.]

In the selection of a person as a prospective operator of one of its stations, Richfield is interested in an applicant's qualifications in respect to character, stability, reputation in the community and personal appearance. [R. 1587, 1719-20.] W. G. King, Jr., Richfield's Vice President in charge of marketing, testified:

> "We endeavor to be very careful in our selection of operators. We are looking for men of good character, of stability, because we are turning over a valuable property to them. We inquire into how long they have lived in the community, and their family,

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[9]Two of the government's witnesses who were L. O. operators each testified that they were looking for stations and requested Richfield to permit them to operate one of Richfield's stations. [Cooper, R. 830-1; Pearce, R. 840-1.]

and past business connections, and experience. In other words, we try to select people of good character who are stable, who will be a credit to Richfield in meeting the public." [R. 1587.][10]

In interviewing prospective operators Richfield used various forms entitled, respectively, "Dealer Franchise Application," "Application for Prospective Sublessees," "Application for Employment" [Stipulation of Facts, Ex. A; R. 405-11, 762], all designed to reveal the applicant's background, qualities and character references. [R. 1719-20.][11]

L. O. operators were sometimes promoted from one station to another or from a station to a salaried position in the marketing department. [R. 1149, 1730-1.]

E. Matters of Which Prospective Operator Is Informed Prior to His Installation in Station.

It is standard practice for the merchandisers to inform and instruct each prospective operator of Richfield's requirements and practices at its L. O. stations concerning the following matters:

(i) that the operator and his helpers wear approved Richfield uniforms [R. 1720];

(ii) that the station be manned by a minimum crew of helpers [R. 1720-1];

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[10]See similar testimony by former merchandisers who were government witnesses. [Miner, R. 756; Pitman, R. 875.]

[11]Government witnesses testified similarly to the use of such forms. [Miner (merchandiser), R. 765-6; de Lucchi (L. O. operator), R. 1379; Ex. K, R. 425, 1379.]

(iii) that the station remain open certain designated hours [R. 1721];

(iv) that the operator and his helpers maintain a standard of personal cleanliness in appearance [R. 1721];

(v) that the operator and his helpers maintain designated pump island procedure in dealing with the public [R. 1721-2];

(vi) that Richfield's petroleum products be handled exclusively [R. 1723];

(vii) that approved automotive accessories be secured from Richfield's local distributor if the latter is able to supply the operator [R. 1723];

(viii) that the operator follow directed procedure in the use of Richfield's credit cards [R. 1723-4];

(ix) that the operator not display unapproved or competitive signs [R. 1724];

(x) that the operator attend training meetings [R. 1724];

(xi) that Richfield's merchandiser will periodically inspect the station and the operator's maintenance and operating methods and instruct him on any matters determined to be corrected [R. 1725, 1732];

(xii) that the incoming operator shall acquire from the outgoing operator the latter's stock of Richfield petroleum products, approved automotive accessories and service station tools; and that the incoming operator shall not acquire other items from the outgoing operator [R. 1725-6];

(xiii) that Richfield has an obligation to assist the operator in disposing, at termination of his occupancy, of his stock of Richfield petroleum products and approved items of automotive accessories and equipment [R. 1595-6, 1726]; and

(xiv) that the operator does not acquire or develop any good will and will not be permitted to make a charge for any intangible business value to any successor operator in the station. [R. 1728-9.]

Further, it is Richfield's practice to inform the prospective operator of the necessity of his signing a Form 542 Lease [Ex. 1-G; R. 251-2, 567] and to discuss with him the clause therein permitting termination by either party on twenty-four hours' notice. It is explained to him that the right to terminate is mutual. "We insist on its being there for our own protection and for the protection of our other L. O. dealers, so that we can recover possession if the operation becomes substandard, or anything of that nature." [R. 1729.]

Richfield's basic rental policy of one cent per gallon with a certain stipulated minimum is also explained to the prospective operator. [R. 1729-30.]

F. Operation and Supervision of L. O. Station.

The operator bears certain expenses relating to the operation of the station. He furnishes small tools (movable equipment such as lubrication and tire equipment) and pays for the inventory of petroleum products and accessories. While Richfield bears all losses on sales made by the operator to persons holding Richfield credit cards, the operator is responsible for credit extended by him to other persons. [R. 663-4.]

The petroleum products are not consigned by Richfield to the operator, but are purchased by him. [R. 1655-6.]

Richfield does not pay the operator a salary or wages [R. 661-2] nor does it pay social security taxes or premiums on workmen's compensation insurance on account of the operator. [R. 666-7.]

At the time of installing the operator in the L. O. station, the merchandiser spends substantial time with the operator instructing him in the general practices and policies to be maintained at all L. O. units. Thereafter the merchandiser calls on the operator from two days a week to once a month, depending on the operator's ability. [R. 1731-2.]

The merchandiser uses Richfield's Form 1071 [Ex. V; R. 497-514, 1733] as a guide in training the operator. [R. 1733.]

The merchandiser goes over the station with the operator every sixty days and together they fill in Richfield's Form 205 [Ex. C; R. 412, 768] which informs the operator of the matters to be corrected and discloses whether the operator is making progress. [R. 1732.]

G. Facilities and Financial Help Furnished by Richfield to L. O. Operators.

Richfield has made a practice of rendering to the L. O. operators financial assistance of four types:

(1) Richfield has furnished each L. O. operator with a fully equipped service station (excepting only small tools and lubricating equipment to be furnished by the operator) [R. 1590-2, 1670-1] at a rental substantially less than the fair rental value of the station.

Rentals charged to L. O. operators do not exceed one cent (1¢) per gallon. [R. 1587-9, 1669.] On the other hand, the fair rental value of an equipped service station is not less than one and one-half cents per gallon [R. 1758], an amount 50% in excess of that charged to the L. O. operators. Exhibit AA [R. 518, 1778] shows a schedule of the excess of rentals paid by Richfield to the property owners on those L. O. stations leased by Richfield over and above rentals on the same stations received by Richfield from the L. O. operators. For example, during the year 1950, rentals paid by Richfield amounted to $1,442,099.89, while rentals received from the L. O. operators from the same stations amounted to $956,563.35. Richfield, therefore, absorbed, without reimbursement, rentals to the extent of $485,536.54, an amount equal to more than 50% of the rentals so received.

Many of these stations represented an investment of $25,000.00 to $35,000.00, "a property that would be far beyond the average individual's ability to acquire otherwise." [R. 1590.] Richfield's investment in L. O. service stations as of December 31, 1950 was $19,542,082.58, of which the cost of land purchased represents $11,213,657.33, and the cost, after depreciation, of certain improvements installed $8,328,425.25.[12] [Ex. AB; R. 519, 1779.]

(2) Richfield has maintained a practice of waiving or reducing the operator's rentals, sometimes to $1.00 per

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[12]It is not correct, as stated in the District Court's Opinion [R. 77], that the latter figure was deducted as depreciation for tax purposes over a five-year period. The testimony concerning amortization for tax purposes over a five-year period pertained to the additions to the refinery facilities installed at the request of the government during the war. [R. 1786.]

month, whenever the operator has experienced difficulty in developing a satisfactory volume of business or if he was confronted with conditions beyond his control; "in other words, whenever it was necessary to assist him in operating the station." [R. 1588.]

(3) Richfield has subsidized L. O. operators during "price wars" to the extent of their full margin of profit if they reduced prices to meet competition. [R. 1592-4, 1705; Ex. F, R. 419-21, 908.]

(4) Richfield has made a practice of lending money to L. O. operators so that they can carry adequate inventories of petroleum products. [R. 1590.]

H. Termination of L. O. Operators.

In Richfield's practice, the following circumstances have warranted Richfield's terminating the tenure of an L. O. operator: insufficient inventory, operation of a dirty station, failure to maintain sufficient operating hours, insufficient crew of helpers, absentee operation or failure to carry Richfield's products exclusively. [R. 1734-5, 1741.]

5. DETAILED STATEMENT CONCERNING THE 337 STATIONS.

Richfield solicits the business of independent dealers on the basis of either its so-called 337 transaction or its so-called 3-C transaction. Whether the solicitation is on a 337 or 3-C basis depends upon competition. Richfield tries to secure the business on the basis of its 337 deal; but where it has to make some "investment" to meet competitive offers, Richfield endeavors to negotiate the transaction on the basis of its 3-C deal. [R. 1619, 1681-2.]

A. NATURE OF THE WRITTEN CONTRACT.

In the 337 transaction, Richfield has entered into a written contract with the 337 dealer providing for the sale of specified quantities of petroleum products. Richfield's printed form of sales contract has gone through successive reprints from 1937 to date. [Ex. A, R. 402-3, 762; Exs. 5, 5-B, 5-D and 5-G, R. 268, 270, 272, 276, 567.]

Forms used prior to 1948 contained provision for a specified term with a right to Richfield as seller to terminate the agreement on five days' written notice. All forms used subsequent to August 1948 contained provision for termination by either Richfield or the 337 dealer on thirty days' written notice; and sales contracts then in existence on prior forms were modified to provide for similar mutual rights of termination. [Stipulation of Facts, Ex. A; R. 402-3, 762.]

None of the successive forms of sales contracts have ever provided for "exclusive dealing" by the dealer in any petroleum products. The contract is not an "entire requirements" contract (of the nature involved in *Standard Oil Company of California v. U. S.*, 337 U. S. 293; 93 L. Ed. 1371); nor does it forbid or preclude the dealer from buying additional quantities of any of such petroleum products from any supplier of his choice at any time. The contract provides:

> "Seller agrees to sell and deliver to Buyer and Buyer agrees to purchase from Seller, as ordered by Buyer during the term hereof, the following petro-

leum products in calendar monthly quantities not greater than the maximum nor less than the minimum amounts hereinbelow specified for the respective products. For fractional monthly periods said amounts will be duly prorated.

	Minimum	*Maximum*
Gasolines	..... gals.	..... gals.
Lubricating Oils	..... gals.	..... gals.
Greases	..... lbs.	..... lbs."

[Ex. 5-G; R. 276, 567.]

The dealer's obligation is limited to the purchase of the minimum quantities specified. The dealer has the right to purchase additional quantities of such products up to the maximum quantities specified. [R. 619, 1620, 1694.]

The manner of arriving at the minimum quantity to be inserted in the contract has been the subject matter of instructions by Richfield's management. Prior to 1948 Richfield's instructions to its sales representatives were to insert such quantity as might be reached by mutual agreement between the salesman and the dealer. In August of 1948, on the advice of its legal department following Judge Yankwich's decision in *United States v. Standard Oil Company of California,* 78 Fed. Supp. 850, Richfield issued instructions to its salesmen that in negotiating a 337 sales contract, the designated minimum quantity of gasoline to be inserted in the contract ***could not exceed*** 85% of the 337 dealer's known past sales. Early in 1950 these instructions were changed to reduce the

specified quantity to a figure *not in excess* of 75% of the dealer's past sales. [R. 1620-1, 1707-8.]

Exhibit Y [R. 516, 1766] is a compilation of all 337 and 3-C sales contracts in effect as of February 28, 1951. The compilation shows that the quantities which the dealers obligated themselves to purchase were substantially less than the respective dealers' anticipated requirements of such products based on their past experience.[13]

Never has Richfield contracted with any 337 dealer on the basis of the latter's entire requirements. [R. 1620.] When Richfield intended to seek and procure the obligation of a dealer to purchase his entire requirements, as was the case only with those 3-C dealers with whom Richfield entered into sales contracts between 1945 and 1948, as hereinafter discussed, Richfield's contracts so specified. [R. 1642-3; Ex. 4-B, R. 265, 567.]

The 337 contract has always been limited to petroleum products. Richfield has made no contract with any 337 dealer covering automotive accessories. [R. 1627.]

Richfield has also entered into a so-called written "painting agreement" with certain of the 337 dealers. [Stipulation of Facts, Ex. A; R. 403, 762.] A paint-

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[13]The compilation was made (a) by comparing the quantity which each dealer obligated himself to buy in his sales contract (*i. e.*, the so-called "minimum") with such dealer's average monthly purchases for the year preceding the date of his contract; and (b) after the ratio of obligation to past experience was so determined for each contract, by assembling all of the sales contracts into four groups, each group relating to a different span of ratios.

ing agreement was not entered into with each 337 dealer but was used only when the dealer desired that his station be painted. [R. 1621.] For example, of the 1361 sales contracts in effect as of December 31, 1950, 267 were made with dealers who signed no painting agreement at all; 853 sales contracts had been made concurrently with painting agreements; and 241 sales contracts had been made without any concurrent painting agreement but a painting agreement was subsequently entered into at the time the station was painted. [R. 1621-3; Ex. 26-A, R. 335-6, 1540.]

The painting of service stations by supplying oil companies is a practice which has been developed by competition. [R. 1622, 1083-4.] The dealer desires to have his station painted in the identifying colors of his supplier for advertising value and for the preservation of his station. [R. 1622.]

Richfield has never required dealers to make a painting agreement or to have their stations painted in Richfield's colors as a condition upon Richfield's sale of gasoline to them. [R. 1623.]

The cost of painting a station varies from $500 or $600 to $1200 or $1500 which explains Richfield's reason for not painting a station unless the dealer enters into a painting agreement obligating himself to repay Richfield the cost of the painting if the dealer fails to buy the fixed quantity which he is obligated to buy under the sales contract. [R. 1624-5, 1693-4.]

B. WHETHER RICHFIELD ENTERED INTO ORAL CONTRACTS, AGREEMENTS OR UNDERSTANDINGS WITH THE 337 DEALERS REQUIRING THEM TO HANDLE ON AN EXCLUSIVE BASIS PETROLEUM PRODUCTS OR AUTOMOTIVE ACCESSORIES MANUFACTURED OR SPONSORED BY RICHFIELD.[14]

W. G. King, Jr., testified unequivocally that there was no such oral contract, agreement or understanding and that "I have issued instructions that no oral agreements are to be made, and that the entire agreement between Richfield and customer must be represented by our customary contract provided for that purpose." [R. 1627-8.]

Richfield has not authorized any of the personnel in its marketing department to make any oral agreement with any dealer. Richfield has delegated authority concerning the making of written contracts, including the written sales contracts and painting agreements above described; and under that authorization such agreements may be signed by designated persons only if there are no changes or alterations in the forms as printed. [R. 1574-9; Exs. O and O-1, R. 488A to D, 1576-7.]

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[14]Assignment of Error II-1-(a) [R. 205-6] is directed against various designated findings of the District Court determining that Richfield entered into oral agreements of such nature with the 337 and 3-C dealers.

Notwithstanding that the District Court found (Finding 33) that there was such an oral agreement with *each* of the 337 and 3-C dealers, there is no evidence in the record of an oral agreement with any of the 337 or 3-C dealers. Pages 125 and 126 of this Brief contain a statement and analysis of all testimony pertinent to this phase of the case.

C. Buying Habits of 337 Dealers.

Some seventy-five percent (75%) of the 337 dealers handle non-Richfield lubricating oils and greases and automotive accessories, and display signs advertising that fact. [R. 1706-7.]

In so far as gasoline is concerned, the 337 dealers in practice purchased all of their requirements from Richfield during the period of time that such dealers purchased any gasoline from Richfield, and did not at the same time purchase or handle the gasoline of a competitive supplier in the same station. [R. 1637-9, 1693, 1706.]

In explanation of the reason for such result, Mr. King testified:

> "Well, it is my opinion, as I expressed here a few minutes ago, that the vast majority of dealers today are catering to the buying habits of the public who prefer to patronize stations specializing in the products of some one company. And it has further been our experience that if a dealer becomes dissatisfied with Richfield, either our service or products, that he just cancels his contract and we are entirely through at his station—if he sees fit to stop purchasing from Richfield, why, certainly he can do so. We have found out that they do it whether they have a contract or not." [R. 1639-40.]

Many 337 dealers discontinued completely the handling of Richfield gasoline, both prior to the expiration of their respective sales contracts and at the expiration thereof. [R. 1677-9, 1687, 1693-4, 1706.]

The existence of a painting agreement did not prevent or deter a dealer from discontinuing his purchases of Richfield gasoline, either prior to or at the expiration of

his sales contract. The compilation of dealer accounts lost [Ex. X; R. 515, 1762] shows that of 407 accounts so lost prior to the expiration of the contract, the dealers of 303 (representing 74% of the total) had painting agreements in effect providing for their repayment to Richfield of the cost of painting because of such discontinuance.

D. Split Pump Accounts.

On June 16, 1938, W. T. Dinkins, the then head of Richfield's marketing department, issued to his three division managers (one of whom was W. G. King, Jr., subsequently Dinkins' successor as Vice President) instructions to "discontinue all split pump resale accounts." [Ex. 9; R. 284, 658.]

Pursuant to those instructions Richfield then withdrew from the forty or fifty split pump accounts which it then had, but without making any public announcement to the trade in connection with such withdrawal. [R. 1635-6.] While these instructions were not rescinded, they became meaningless as time went on. [R. 659, 1636-7.]

The reason the instructions became meaningless, as explained by Mr. King, was a change in buying habits which resulted in dealers, as a matter of preference and volition, confining themselves to gasoline of one supplier at a time. Just prior to World War II, 98% of the independent dealers operated their stations on the basis of handling the gasoline of one supplier only. This transition in the buying preference of the overwhelming majority of the independent dealers was responsive to a change commencing in the 1930's in the buying habits of the motoring public to patronizing stations which specialized in one

supplier's gasoline. Less than 2% of the independent dealers are presently operating split-pump stations. [R. 1636-7.]

Richfield *does not solicit* the business of those *particular dealers* operating the less than 2% split pump stations. Those stations are not considered by Richfield as desirable business because of their facilities, type of service, manner of operations, etc. [R. 655, 1638.]

On the other hand (with the sole exception of those independent dealers solicited on a 3-C sales contract basis during the period of time from 1945 to August of 1948 when the same were on an "entire requirements" basis), Richfield has not solicited the business of any independent dealer on the basis of any agreement or understanding that he buy all of his requirements of gasoline or other petroleum products from Richfield. [R. 1620, 1627, 1638, 1644.]

The business of those independent dealers which Richfield seeks is solicited on the quantity basis above described, with the dealer not being permitted to obligate himself to purchase in excess of 75% of his past experience. [R. 1620-1, 1707-8.] Richfield hopes that such independent dealers will want to buy all of their gasoline from Richfield, but it does not impose any such obligation or requirement on any of them. [R. 1678-9, 1688.]

Mr. King did not recall any instance where a 337 dealer had elected to install a competitor's gasoline while at the same time purchasing Richfield's gasoline. [R. 1678.] With the sole exception of one isolated incident occurring in 1941 and testified to by McRae, a former 337 dealer [R. 1224-6], the government did not offer proof of any instance in which any independent dealer

whose business was solicited by Richfield announced to Richfield his desire or intention to handle at the same time gasoline of both Richfieid and some other supplier, or of any instance occurring during the period of twelve years prior to the trial when Richfield either refused initially to sell or discontinued sales to any 337 dealer who desired to operate a split pump station.

E. Termination of 337 Sales Contracts.

Other than the forty to fifty split pump accounts from which Richfield withdrew upon issuance of the June, 1938 letter of instructions [R. 1635-6], Richfield has never terminated a sales contract prior to its stated expiration, excepting only where the 337 dealer himself had discontinued entirely his purchases of gasoline from Richfield, following which occurrence Richfield at times gave notices of termination to serve one of two purposes: either to effect collection under the painting agreement if one was in existence with that particular dealer, or to clear Richfield's files of inactive contracts. [R. 1630-5.]

Mr. King had no knowledge of the termination of any 337 sales contract under circumstances where the 337 dealer had failed to buy the agreed quantity of gasoline, or had purchased gasoline from another supplier, or had failed to buy oil or grease from Richfield, or had posted competitive signs, or had purchased or stocked competitive petroleum products, or had purchased or stocked non-sponsored automotive accessories, or had purchased sponsored accessories from a non-Richfield TBA (tires, batteries and accessories) distributor. [R. 1631-4.]

Although the Complaint alleged in paragraph XX that Richfield had made threats, both express and implied,

that it would cancel the sales contracts unless the alleged exclusive dealing oral understandings were adhered to and also alleged that "in instances too numerous to be herein mentioned, defendant has actually cancelled * * * the sales agreement of an independent service station operator who refused to conform to the oral contracts, agreements and understandings complained of herein" [R. 7, 8], no evidence of any instance of a threat[18] of cancellation or of an actual cancellation was offered by the government.

F. Comparative Statistics Re the 337 Dealer Stations.

As of December 31, 1948, Richfield had sales contracts with 1107 dealers of the 337 type which constituted 3.08% of the total number of service stations in the area in which Richfield does business. [Ex. M-4; R. 436, 1557.]

For the year 1950, the volume of gasoline sold to 337 dealer stations was 2.03% of the volume sold by all companies to all stations and was 1.33% of the taxable sales of motor fuel by all companies. [Ex. M-5; R. 437-40, 1559.]

For the year 1950, gasoline sold to 337 dealer stations constituted 1.14% of the total gallons of gasoline manufactured and available for sale in Richfield's marketing area. [Ex. Z; R. 517, 1768.]

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[18]It should be noted that government witness Duarte (a TBA distributor and commission agent) testified that sometime before 1946 he was asked by a Richfield salesman to contact 337 dealer Koenen "to see that he got rid of his competitive oil, that Richfield Oil Company had painted his unit, and if he did not get rid of it, they would cancel his lease"; but Duarte did not testify to having told Koenen of the suggested cancellation. [R. 724.]

G. Inspection, Supervision and Control

Notwithstanding that the District Court found (Finding 29) that Richfield "inspects, polices and supervises the activities and sales" of all L. O. operators and all 337 and 3-C dealers, there is no evidence in the record of anything other than normal sales activities by Richfield's salesmen in their sales solicitation of the business of the 337 dealers. Pages 126 to 131 of this Brief contain a statement of all testimony pertinent to this phase of the case. Such testimony does not disclose any acts which can be construed as inspection, policing or supervision.

H. Effect of 337 Transactions on Competitors.

No proof concerning effect on competitors resulting from Richfield's relationship with the 337 dealers was offered by the government.

Exhibit M-8 [R. 449-53, 1560] sets forth the number of companies who have marketed in excess of one million taxable gallons of gasoline per year in Richfield's marketing area. Although there were 68 of such companies in 1950, no representative of any of such companies or of any other company selling gasoline was called by the government as a witness to testify as to the effect upon any of them of any of Richfield's marketing operations, practices or contracts.

The government offered no competitor witness who testified as to his inability to sell any petroleum products or any automotive accessories to any 337 dealer.[16]

6. DETAILED STATEMENT CONCERNING THE 3-C STATIONS.

A. Nature of the Written Contracts.

In the 3-C transaction Richfield has entered into three instruments with the independent dealer consisting of a lease from the dealer to Richfield [Ex. 4; R. 262-3, 567]; a sublease from Richfield to the dealer [Exs. 4-A and 4-D; R. 264, 267, 567]; and a sales contract [Exs. 4-B and 4-C; R. 265, 266, 567]. All three of these instruments were excuted as a part of one transaction. [R. 1641-2.] The printed forms were revised from time to time in the respects described in the Stipulation of Facts. [Ex. A; R. 401-2, 762.]

During the period from 1945 until August, 1948, the sales contract provided for purchase by the dealer of his "entire requirements" of gasoline, lubricating oil and grease. [Ex. 4-B; R. 264, 567.] The 3-C sales transaction was used by Richfield with those independent dealers whose business could only be obtained on the basis

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[16]Each of the 25 competitor witnesses presented by the government testified of his inability to sell or difficulties in selling products to the L. O. operators. The testimony of only three of the competitor witnesses related in any way to sales to dealers. Their testimony, which is discussed hereinafter, related only to 3-C dealers.

of Richfield's meeting competitive offers by making some investment in the station by way of loan of equipment or money, improvements to the dealer's station, etc. [R. 1619, 1643, 1682.]

Richfield reprinted the 3-C sales contract in August of 1948, and made the same similar to the 337 form of sales contract, *i. e.*, an agreement by the buyer to purchase specified quantities of gasoline, lubricating oil and grease and with the right of the buyer to purchase additional quantities up to a stated maximum. [Ex. 4-C; R. 266, 567.]

This change in the 3-C form of sales contract was made by Richfield on the advice of its legal department that the entire requirements provision was illegal, which advice was given following Judge Yankwich's decision in 1948, in the *Standard Oil Company* case. [R. 1643.]

It was stipulated between Richfield and the government:

> "At the time of such print in August of 1948 all copies of the forms of 3-C Sales Contract containing the 'entire requirements' provisions were destroyed and defendant immediately negotiated with all 3-C dealers to terminate the former 'entire requirements' form of Sales Contracts and to execute in lieu thereof the 3-C Operators' Sales Contract Form 783, printed August 1948. As of the date hereof there are in effect only four 3-C Sales Contracts containing the 'exclusive dealing' provisions." [Ex. A; R. 402, 762.]

The greatest number of 3-C contracts on an "entire requirements" basis which Richfield ever had was 182, which number existed as of the end of 1947. [Ex. 26-A, R. 327, 1540.]

After the specified quantity type of sales contract [Ex. 4-C; R. 266, 567] was substituted for the "entire requirements" form in August of 1948, the instructions to the salesmen concerning the maximum quantities which the 3-C dealer would be permitted to obligate himself to purchase were the same as those given with respect to the 337 type of sales contract, *i. e.,* instructions in August of 1948 that the designated quantity could not exceed 85% of the dealer's past known sales, which figure was reduced to 75% early in 1950. [R. 1643, 1707-8.]

B. Whether Richfield Entered Into Oral Contracts, Agreements or Understandings With the 3-C Dealers.

There was no evidence of any oral agreement between Richfield and any one or more of the 261 dealers of the 3-C type. Oral agreements were forbidden by express instructions. See discussion above in connection with 337 stations.

C. Buying Habits of the 3-C Dealers.

The discussion of the buying habits of the 337 dealers is equally applicable to the buying practices of the 3-C dealers subsequent to the change of the 3-C sales contract in August, 1948. [R. 1706-7.]

D. Termination of 3-C Sales Contracts.

There is no evidence of any instance of a termination or threat of termination by Richfield of the nature alleged in the complaint of any 3-C sales contract or lease.

E. Comparative Statistics Re the 3-C Dealer Stations.

As of December 31, 1948, Richfield had contracts with 251 dealers of the 3-C class whose stations constituted 0.7% of the total number of service stations in Richfield's marketing area. [Ex. M-4; R. 436, 1557.]

For the year 1950, the volume of gasoline sold to the 3-C dealer stations was 0.63% of the volume of gasoline sold by all companies to all service stations and was 0.4% of the taxable sales of motor fuel by all companies. [Ex. M-5; R. 437-40, 1559.]

For the year 1950, gasoline sold to the 3-C dealer stations constituted 0.34% of the total quantity of gasoline manufactured and available for sale in Richfield's marketing area. [Ex. Z; R. 517, 1768.]

F. Inspection, Supervision and Control.

Notwithstanding that the District Court found (Finding 29) that Richfield "inspects, polices and supervises the activities and sales" of all L.O. operators and all 337 and 3-C dealers, there is no evidence in the record of anything other than normal sales activities by Richfield's salesmen in their sales solicitation of the business of the 3-C dealers. Pages 126 to 131 of this Brief contain a statement of all testimony pertinent to this phase of the case. Such testimony does not disclose any acts which can be construed as inspection, policing or supervision. The only evidence of efforts by Richfield's

salesmen to have the 3-C dealers confine their activities to Richfield's petroleum products and approved automotive accessories related to times prior to the conversion of the 3-C sales contract form from an entire requirements basis to a specified quantity basis following the decision in the *Standard* case in 1948. [R. 1643.]

G. Effect of 3-C Transactions on Competitors.

The government presented four witnesses of the 3-C dealer type, Moore [R. 1012], Colmery [R. 1191], Strable [R. 1110] and Ogburn [R. 1354]. The only one of them who testified as to a restraint of any nature by Richfield on the products to be handled by him subsequent to the change of the 3-C contract from an "entire requirements" basis was Ogburn. Ogburn testified that he was asked by a commission agent to keep competitive oils hidden; he was not told that he could not handle competitive products. [R. 1357, 1360-1.]

Of the twenty-five competitor witnesses presented at the trial by the government, only three (Ellis, Turner and Cleveland) testified of efforts to sell products to 3-C dealers. Of these three, only Ellis testified to inability to sell his product to a 3-C dealer, Colmery, and this inability occurred at a time when Colmery was on an "entire requirements" form of 3-C contract which he refused to change until Richfield gave him a thirty-day termination privilege. [R. 220-4, 931, 934, 942-4, 1199-1200.]

No other proof concerning any effect on competitors resulting from Richfield's relationship with the 3-C dealers was offered by the government.

7. DISTRIBUTION OF TIRES, BATTERIES AND ACCESSORIES (TBA).

Approved TBA refers to those items of tires, batteries and automotive accessories selected by Richfield which it permits to be sold by service station dealers and operators on credit to those members of the motoring public holding Richfield credit cards. The collection of those credit sales is a risk assumed entirely by Richfield. [R. 663-4; Ex. Q; R. 236, 1641.] The greatest portion of approved TBA purchased by Richfield from the manufacturers is resold by it to TBA distributors appointed by it. In a few isolated instances, Richfield makes direct sales to particular service station dealers who buy in such large volume that they qualify for the same discount as the distributors. [Ex. 26-A; R. 373-5, 1540.] Other items of approved TBA are purchased by TBA distributors from the manufacturers and Richfield receives a commission thereon from the manufacturers. [R. 572-9.]

The TBA distributors sell the products to (a) L. O. operators, (b) independent dealers, both 337 and 3-C, and (c) other dealers not handling Richfield petroleum products. [Ex. 26-A, R. 356, 1540. See also R. 1171-2.]

There is a substantial difference between the L. O. stations and the dealer stations in so far as Richfield's

practices concerning approved TBA are concerned. Richfield has required that the operators of the L. O. stations handle a representative line of approved TBA items. The 337 and 3-C dealers are told that only the approved items may be sold on Richfield's credit cards. Richfield suggests to such dealers that they stock such items, "but if they do not elect to do so, why that ends the matter." [R. 1650.]

Although the District Court found that Richfield had made an oral agreement with each of the 337 and 3-C dealers relating to the purchase by him of his entire requirements of automotive accessories from or through Richfield [Findings 5, 20, 21, 26 and 33; R. 135-56], the record is barren of any evidence whatsoever of any oral agreement or understanding of such nature between Richfield and any of the 337 or 3-C dealers. Similarly, there is no evidence to support the other findings referring to automotive accessories, *i. e.*, that Richfield inspects, polices and supervises the activities of the 3-C and 337 dealers [Finding 29; R. 154]; that competitors were unable to sell the same to the dealers [Findings 45 and 46; R. 161-2]; and that the dealers were unable to purchase competitive accessories. [Finding 47; R. 162.]

Specifications of Assigned Errors Intended to Be Urged.

The errors assigned which relate to the L. O. stations are contained in Part I of the Assignment and comprise twelve separate charges of error. [R. 195-205.]

Under Point I(A) of the Argument, which asserts that the relationship between Richfield and the L. O. operators is such that the restrictions imposed by Richfield thereon are not cognizable under Section 1 of the Sherman Act or Section 3 of the Clayton Act, Richfield will urge (a) the errors assigned to certain of the District Court's conclusions of law (Assignments 1, 2, 4 and 7) [R. 195-7, 201]; (b) the errors assigned to certain of the District Court's findings of fact (Assignment 3) [R. 196]; and (c) the errors assigned to the failure of the District Court to make certain findings of undisputed facts which the District Court ignored (Assignments 5 and 6). [R. 197-201.]

Under Point I(B) of the Argument, which asserts that even if the restrictions imposed by Richfield on the L. O. operators are otherwise cognizable under such Acts, nevertheless there is no showing of unreasonableness under Section 1 of the Sherman Act or substantiality under Section 3 of the Clayton Act, Richfield will urge (a) the errors assigned to certain of the District Court's conclusions of law (Assignments 9, 10 and 11(a) and 11(b)) [R. 203-4]; and (b) the errors assigned to the failure of the District Court to make certain findings of undisputed material facts (Assignment 8). [R. 202-3.]

Under Point I(C) of the Argument, which asserts that even if the Supreme Court should affirm the determination by the District Court that restrictions upon the L.

O. operators violate either Section 1 of the Sherman Act or Section 3 of the Clayton Act, nevertheless certain of the injunctive portions of the decree are erroneous, Richfield will urge the errors assigned to the Judgment (Assignments 11(c), 11(d) and 12). [R. 204-5.]

The errors assigned which relate to the independent dealer stations (including both the 337 and 3-C stations) are contained in Part II of the Assignment and comprise six separate charges of error. [R. 205-213.]

Under Point II(A) of the Argument, which asserts that the contracts between Richfield and the 337 and 3-C dealers are not exclusive dealing or requirements contracts, Richfield will urge (a) the errors assigned to certain of the District Court's conclusions of law (Assignments 2 and 6) [R. 207-9, 212-3]; (b) the errors assigned to certain of the District Court's findings of fact (Assignment 1) [R. 205-7]; and (c) the errors assigned to the failure of the District Court to make certain findings of undisputed material facts (Assignments 3(a), 3(b), 3(c) and 3(d)). [R. 209-11.]

Under Point II(B) of the Argument, which asserts that even if Richfield's contracts with the 337 or 3-C dealers could conceivably constitute exclusive dealing or requirements contracts, nevertheless there is no showing of unreasonableness under Section 1 of the Sherman Act or substantiality under Section 3 of the Clayton Act, Richfield will urge (a) the errors assigned to certain of the District Court's conclusions of law (Assignments 4, 5, 6(b) and 6(c)) [R. 212-3]; and (b) the errors assigned to the failure of the District Court to make certain findings of undisputed material facts (Assignments 3(e) to 3(p), inclusive). [R. 211-2.]

SUMMARY OF ARGUMENT.

Introduction.

Since the issues concerning the L. O. stations differ so completely from those concerning the Dealer stations (both the 337 and 3-C), the Argument will be stated separately as to each of such categories.

It is well to picture each category of station in the mirror of the other for that will bring into sharp focus the significant differences in the two which compel the recognition and determination that while the dealers in the 337 and 3-C stations are independent merchants and legitimate customers of the various competing oil companies, the L. O. operators are not.

I.
The L. O. Stations.

A. The District Court erroneously concluded that restrictions imposed by Richfield upon the operators installed by it on a temporary basis in its own L. O. stations violate Section 1 of the Sherman Act and Section 3 of the Clayton Act notwithstanding a clear showing that, ***under the facts and circumstances here involved,*** the trade and custom of such stations is Richfield's trade, such stations as so operated are not a legitimate market for Richfield's competitors, and the L. O. operators are not independent businessmen as that concept is understood in anti-trust law.

Restrictions against the handling of competitive products imposed by an employer upon his employees are not cognizable under either of such Acts. Nor are similar restrictions imposed by a principal upon his agents, par-

ticularly those who perform their functions in places of business or instrumentalities of doing business furnished by the principal. The underlying reason for such results is that in the presence of either of such relationships of employment or agency, the business conducted by the employee or agent is that of the employer or principal and does not constitute a legitimate market for the products of the competitors of the employer or principal which could be unlawfully "foreclosed."

The purpose and objective of the anti-trust laws is to insure the freedom of competition and to prevent restrictions on access by competitors to the market. Restrictions imposed by a supplier upon persons who are not its customers but are a part of its own sales organization cannot injuriously affect competitors in their access to the market. Only by ignoring the relationship, "in terms of restraint of trade," between the supplier and his employee or agent and by considering the employee or agent to be an independent businessman and therefore a customer of and a legitimate market for competitors can the supplier's restrictions on such persons be of a nature cognizable under the Sherman or Clayton Acts. The recognition of such underlying reason and principle will, we respectfully suggest, lead unerringly to the conclusion that Richfield's relationship with the L. O. operators, while it is not one of salaried employment or agency within traditional common law definitions, nevertheless contains all the same attributes when viewed from the standpoint of economic reality and in the light of what is the relevant market.

The District Court's findings of fact ignore and accordingly treat as immaterial all of the uncontradicted evidence pertaining to the nature of the relationship be-

tween Richfield and the L. O. operators which demonstrates that such relationship is not primarily that of buyer and seller, supplier and customer or landlord and tenant; but that the operators are functionally an integral part of Richfield's own sales organization and are not independent businessmen (regardless of whether they be deemed to be independent contractors in other fields of law). Such relationship between Richfield and the L. O. operators must be determined from a consideration of all of the facts and circumstances here involved (as to which there is no dispute or conflict of evidence whatsoever) and not by any one isolated facet thereof. The District Court determined that the printed lease signed by the L. O. operator was decisive. Ignored were the many other terms and conditions of the arrangement, including Richfield's requirements concerning the various phases of the operation and maintenance of the station which the operator is instructed and required to adhere to as conditions to his continued occupancy of Richfield's station, and of which the operator is orally informed before he is installed.[17] Ignored was the manner of securing and selecting potential operators, including the investigation of their character, family and habits. Ignored was the fact of Richfield's furnishing to the operators, at substantially less than their fair rental value, the valuable, fully equipped service stations which are the instrumentalities of doing business. Ignored was the fact that before the operator enters the station, he knows that his occupancy is temporary and may be terminated on short notice. Ignored also was the reservation by Richfield of the right

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[17]See portion of Statement on pages 14 to 16 of this Brief.

of continuous inspection and supervision of the station and its operator to determine compliance with its requirements, which reservation negates the statement in the District Court's opinion that the operator has exclusive possession against all the world, including Richfield. [R. 79.]

Furthermore, such relationship must be determined in the proper framework of inquiry, *i. e.*, whether, ***within the meaning of the anti-trust laws,*** these operators are independent businessmen and whether the business of the L. O. stations is a legitimate market for Richfield's competitors. It serves no purpose to attempt to determine or define the relationship in a different framework of inquiry, as for example whether the operators are employees of Richfield or independent contractors for purposes of payroll or social security taxes, workmen's compensation insurance, withholding taxes, tort liability and the like. Likewise it is not decisive of the problem, as the District Court thought, that the L. O. operator signs a lease on the station assigned to him by Richfield. The relationship of landlord and tenant determined by the District Court to exist from the use of the printed form of lease with its twenty-four hour termination provision does not preclude a determination that for the purposes of the application of the anti-trust laws, the L. O. operator is not an independent businessman and that the business of the station is not a legitimate market for Richfield's competitors.

Standard Oil Company of California v. U. S., 337 U. S. 293; 93 L. Ed. 1371, relied upon by the District Court in its Opinion, differs materially from this case and is

not authority supporting the judgment under either the Sherman or Clayton Act. No issue was raised in that case that the lessees of Standard's stations were not independent; and the issues and problems here raised were not present, considered or discussed. Nor were the facts in the *Standard* case at all comparable to those here involved, as will be discussed in the Argument hereinafter.

The District Court, by its own analysis, placed its judgment finally on the narrow ground that the "form" of the transaction "chosen" by Richfield (the printed form of lease to the L. O. operators) compelled its decision.[18] The Judgment cannot be sustained on such ground since it ignores the same factors above discussed concerning the absence of a legitimate market and the problem of an independent businessman status. Injunctions in anti-trust cases, resulting as they do in important and far-reaching economic consequences, should not be issued on the frail ground that while in substance the

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[18]The Opinion states: "So Richfield is tied to the *form* they chose. And if it does not give them immunity from the admitted restraints they impose through it, they must bear the consequences of their voluntary act, regardless of any contrary intention they may have had in choosing it." (Emphasis supplied.) [R. 85.]

The Opinion states further: "Even if it be admitted that if the outlet were its 'exclusive agency', the limitation could be imposed as an incident of ownership, under the *form* it has chosen, Richfield cannot deny to the dealers the right to deal with other suppliers as to their products. . . ." (Emphasis supplied.) [R. 89.]

transaction is not an unlawful restraint of trade, nevertheless it is *in form.*[19]

The District Court's decision extends the operation of the Sherman and Clayton Acts into areas in which they traditionally have had no application, and makes illegal under those statutes activities incident to relationships far removed from that of buyer and seller or supplier and customer. Until the judgment in this action, no case had ever determined a violation of either of such Acts under facts comparable to those here presented; and there is substantial authority hereinafter discussed that there is no violation.

B. If it be determined on this appeal that the relationship between Richfield and the L. O. operators is such that the restraints are cognizable under the Sherman and Clayton Acts, nevertheless there are no facts found by the District Court upon which it could properly base its conclusion that the restrictions are unreasonable under the Sherman Act under the tests applicable to such determination, particularly that enunciated in *U. S. v. Columbia Steel Company,* 334 U. S. 495, 524; 92 L. Ed. 1533,

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[19]Note that the District Court, having decided that the vice in the transaction was its *form,* then proceeded to perpetuate such form by taking away Richfield's right contained in the lease to terminate the same at any time, with or without cause, on twenty-four hours' notice, and by enjoining Richfield from terminating any of the existing 1343 L. O. leases, excepting for breach of the written covenants contained therein. See paragraph VI of Judgment. [R. 168-9.]

1552; *i. e.*, whether the effect of the limitations on the L. O. operators has been to restrict unreasonably the opportunities of competitors to market their products. Nor are there facts found which would meet the test of substantiality for purposes of Section 3 of the Clayton Act under the doctrine of *Standard Oil Company of California v. U. S.*, 337 U. S. 293, 314; 93 L. Ed. 1371, 1386.

C. Finally, if it be determined on this appeal that Richfield's restrictions on the L. O. operators do violate either Section 1 of the Sherman Act or Section 3 of the Clayton Act, the judgment of the District Court must nevertheless be reversed because the injunctive provisions relating to the L. O. stations are erroneous and unduly onerous in three respects:

First, the judgment improperly enjoins Richfield from exercising, for any purpose, the 24-hour termination clause contained in the printed lease on the erroneous assumption that the twenty-four hour clause is itself illegal under the law of landlord and tenant.

Second, and more drastically, the judgment enjoins Richfield from terminating the lease of any L. O. operator, even on the 30-day notice basis permitted by the decree, excepting "only for a breach of any of the written covenants contained" therein. [See Judgment, par. VI; R. 168-9.] When it is observed that the lease contains no stated expiration date and therefore continues until terminated and that its written covenants are largely limited to obligations concerning maintenance, repair and rent (which

is fixed at a sum substantially less than the fair rental value of the station and facilities) and do not cover Richfield's many requirements upon the operator concerning the operation of the station (only one of which is exclusive dealing in Richfield products), it is apparent that the operation of the injunction could not be other than confiscatory. In effect, the judgment requires Richfield to maintain the L. O. stations for the operators thereof notwithstanding they sell no Richfield products and without right or power in Richfield to take over its own stations and facilities so long as the operator thereof maintains the station in repair and pays the relatively nominal rental.

Third, the District Court denied Richfield's motion [R. 192-3] to include in the decree a qualification concerning the operators' use of Richfield's pumps, tanks or other containers similar to that qualification contained in the decree formulated by the same District Judge in *United States v. Standard Oil Company of California*, 78 Fed. Supp. 850, the case which he deemed determinative of this litigation. The omission of such qualification serves to enjoin Richfield from engaging in certain important competitive marketing practices which Richfield's largest competitor, Standard Oil Company of California, is expressly permitted to engage in by the judgment in the *Standard* case.

All other issues of this case to one side, we respectfully suggest that the Supreme Court should not condone in a case of this nature an injunction so patently punitive.

II.

The Dealer Stations.

A. The written contracts with the 337 and 3-C dealers do not provide for exclusive dealing in any products.[20] The government recognized this and accordingly the complaint charged (1) that Richfield had made supplemental *oral* contracts, agreements and understandings with *each* of the 337 and 3-C dealers by which they agreed to handle only Richfield's petroleum products and automotive accessories [Compl. pars. 17-19; R. 6-7]; and (2) that Richfield had required such dealers to adhere to such oral agreements and understandings by certain alleged coercive methods: (a) by threats of cancellation of the written sales contracts and leases[21] unless the alleged oral agreements were made and adhered to; (b) by inspection, policing and supervision of the activities and sales of the 337 and 3-C dealers; and (c) by actual cancellation "in in-

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[20]The written contracts with each of the 337 dealers and each of the 3-C dealers (excepting only those four 3-C sales contracts entered into prior to August of 1948 and unmodified at the time of trial) provided for the purchase, not of the dealer's entire requirements, but of a *specified quantity* of petroleum products. [Ex. A; R. 401-2, 762.] The quantities set forth in the contracts were substantially less than the dealers' anticipated purchases based on their past experience. [Ex. Y; R. 516, 1766.]

[21]The lease used in a 3-C transaction is entirely different from the lease used with the L. O. operator. [See Exs. 4-A and 4-D relating to the 3-C stations, R. 264, 267, 567; and Exs. 1-B and 1-G relating to the L. O. stations, R. 243-4, 251-2, 567.] In the 3-C transaction, the 3-C dealer is Richfield's lessor and sublessee. [Ex. A; R. 401, 762.]

stances too numerous to be herein mentioned" of the written lease or sales agreement of a dealer who refused to conform to the alleged oral agreements. [Compl. par. 20; R. 7-8.]

While the District Court made findings in favor of the government on each of such allegations, such findings are clearly erroneous under Rule 52(a) F. R. C. P.[22] The government's proof in support of its charges was minuscule in nature and limited to petty incidents both sporadic and remote in relation to the time of trial.

The government did not show any oral contract, agreement or understanding of exclusive dealing with any of the existing 337 or 3-C dealers; and the government showed only one instance, which occurred in 1941, which could possibly be construed as an oral understanding of exclusive dealing with any former 337 or 3-C dealer. Notwithstanding that there were 1361 dealers holding 337 sales contracts with Richfield at the time of trial and many others who had formerly been 337 dealers, the government called as witnesses only two such dealers.[23] Of the 261 dealers holding 3-C contracts with Richfield at the time of trial, the government called three as witnesses and also called one man, Ogborn, who operated

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[22]The particular findings so challenged are described in Assignment of Error II (1) [R. 205-7].

[23]One of these, McRae, had not been a dealer subsequent to 1946 [R. 1224]. The other, Moore, the current 337 dealer, did not testify to any oral contract, agreement or understanding [R. 1012-36].

a 3-C station under some arrangement between him and the 3-C dealer. None of these witnesses testified to any oral contract, agreement or understanding as alleged.

The government's proof as to the alleged coercive tactics was similarly petty, trivial and unsubstantial. The testimony offered by the government, which fell far short of proof of acts which could be considered coercive, related to incidents occurring not more recently than five years prior to the trial. Not by the grossest exaggeration could the government's proof support an inference of a pattern of coercive tactics known to, approved or condoned by Richfield's management.

The District Court's Opinion held that the contracts are requirements contracts.[24]

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[24]The Opinion states: "And, when confronted by a series of instruments, the sole object of which is to tie these stations to contracts which, in effect, are *requirement* contracts, although not so denominated, the testimony of the men in the field who actually were told that they *could not* trade freely with outsiders fits into the scheme which the sales contracts coupled with the leases, and the sales contracts coupled with the painting agreements, evidently was intended to set up." (Emphasis by Court.) [R. 93.]

Wholly without reason or authority is the rule of law so suggested by the District Court, to wit, that a sales contract providing for a specified quantity substantially less than the purchaser's anticipated requirements is an illegal "exclusive dealing contract" when used in connection with (a) a collateral agreement under which the purchaser, who has received without charge the painting of his place of business, agrees to repay to the seller the cost of such painting in the event the purchaser fails to buy the specified quantity, or (b) a lease and sublease under which the seller has the right to retain the lease and to terminate the sublease and the sales contract in the event that the sublessee-purchaser fails to buy the specified quantity.

B. If it be determined on this appeal that Richfield's arrangements with the 337 dealers or with the 3-C dealers could be deemed to be exclusive dealing or requirements contracts, nevertheless, there are no facts found by the District Court upon which it could properly base its conclusion that the arrangements with either class of dealers are unreasonable under the Sherman Act under the tests applicable to such determination, nor are there facts found upon which the District Court could properly determine substantiality for purposes of Section 3 of the Clayton Act.

ARGUMENT.

I.

THE L. O. STATIONS.

A. The Nature of Richfield's Relationship With the L. O. Operators Is Such That the Trade and Custom of the L. O. Stations as Operated by the L. O. Operators Is Richfield's Trade and Custom and Is Not the Subject Matter of Competition Between Richfield and Its Competitors and Is Not a Legitimate Market for Richfield's Competitors. Neither Section 1 of the Sherman Act nor Section 3 of the Clayton Act Apply to Richfield's Restrictions on the L. O. Operators Any More Than They Apply to Restrictions Imposed by a Supplier on Its Own Employees or Agents Operating in the Supplier's Own Places of Business.

We respectfully submit that under the facts and circumstances of this case, it is demonstrable that there exists an intimate relationship between Richfield and each L. O. operator of such nature that the L. O. station is itself merely an outlet lawfully controlled by Richfield for the sale of its products to the market, *i. e.*, the buying public, and that neither the L. O. station nor its operator is a market for Richfield's competitors. We submit further that it is demonstrable that the relationship is analogous to the relationship of employment or agency for the purposes of and within the scope and meaning of the Sherman and Clayton Acts; and that the same underlying reason which permits an employer or principal lawfully and without violation of either of such Acts to restrict the employee or agent to the handling of the supplier's products applies equally to Richfield's relationship with the L. O. operators.

The L. O. stations are not operated by independent merchants regularly engaged in their own places of business in the purchase of petroleum products on a competitive and arm's length basis from suppliers of their own selection. Richfield has acquired and constructed the L. O. stations to serve a valid business purpose, to-wit, as outlets for the sale of Richfield's petroleum products; and Richfield has from time to time installed therein operators selected and trained by Richfield to operate the stations in the manner prescribed by it. Richfield has reserved the right to and does exercise constant supervision and control over the operators in the day to day operation of the stations. The operators have a limited right to occupy the premises under a tenancy which, in order to implement Richfield's right of control and supervision, is designedly on a temporary basis terminable on 24 hours' notice. These stations are valuable instrumentalities of doing business furnished by Richfield to the operators at substantially less than their fair rental value.

The relationship between Richfield and the L. O. operators is not primarily that of supplier and customer or seller and buyer. The operators are functionally an integral part of Richfield's sales organization. If Richfield elects, by closing one of its L. O. stations and discharging the operator thereof, not to supply it with petroleum products, no competitor of Richfield will sell petroleum products to such service station since there is no one there other than Richfield to whom such sale can be made.[25]

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[25]Compare this attribute of the L. O. stations with the stations of the 337 and 3-C dealers who are truly independent businessmen since they own or control their places of doing business and deal on an arm's length basis of buyer and seller with suppliers of their own selection. If Richfield does not sell petroleum products to the 337 and 3-C stations, other suppliers of petroleum products will do so.

Richfield cannot be compelled under the anti-trust laws to buy the petroleum products of other suppliers and thus be required to compete against itself. Under these circumstances Richfield's requirement that the operators of Richfield's L. O. stations handle only Richfield's petroleum products cannot either factually or in contemplation of law affect competition, substantially or otherwise; and such requirement cannot violate either Section 1 of the Sherman Act or Section 3 of the Clayton Act.

We respectfully submit that a recognition of the underlying reason for the exclusion, from application of the anti-trust laws, of restrictions imposed upon employees and agents, as hereinafter discussed, will lead to the determination that within the same framework of inquiry, *i. e.*, "in terms of restraint of trade," Richfield's relationship with the L. O. operators contains all the same attributes as those of employment or agency.

(1) THE UNDERLYING REASON FOR THE EXCLUSION OF EMPLOYMENT, AGENCY AND OTHER INTIMATE RELATIONSHIPS FROM PROHIBITIONS OF SECTION 1 OF THE SHERMAN ACT AND SECTION 3 OF THE CLAYTON ACT IS THAT IN THE PRESENCE OF SUCH RELATIONSHIPS, THERE IS NO INDEPENDENT BUSINESSMAN STATUS AND THEREFORE NO LEGITIMATE MARKET OR SUBJECT MATTER OF COMPETITION.

United States v. Standard Oil Co. of California, 78 Fed. Supp. 850 (D. C. Cal. 1948)[26] involved both (a)

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[26]Affirmed in 337 U. S. 293; 93 L. Ed. 1371 (1949).

The appeal concerned only the 5937 independent stations and not the 1063 employee operated stations, although the Supreme Court referred to the latter, in passing, as Standard's "own service stations." (*Id.* at 295; *id.* at 1376.)

1063 so-called "employee operated stations" managed by Standard Stations, Incorporated, and (b) 5937 independent service stations operated by dealers who were obligated by contracts to purchase from Standard their entire requirements of petroleum products and automotive accessories. With respect to the first group of stations, the District Court said, on page 854:

> "* * *, no further reference need to be made to stations so operated, which have been referred to in the evidence as 'employee operated stations.' The Government does not question (indeed it could not) the right of the Standard Oil Company of California to operate its own stations and sell therein any product it manufactures or distributes."

Why "could not" the government question Standard's right to require exclusive dealing in Standard's products in its own stations operated by it? The District Court did not state the reason; nor have we been able to find a clear and definitive statement of the reason for a conclusion so obvious and well recognized. *Nevertheless, we respectfully submit that the true reason is that a station so owned and operated is merely an outlet to the market and is not a part of the market for petroleum products for which the various suppliers are competitors or from which they can be unlawfully foreclosed.* It could not be an unreasonable restraint of trade for Standard to restrict a salaried employee in one of Standard's own stations from handling therein the gasoline of one of Standard's competitors for the personal benefit of such employee and competitor and to the detriment of the volume of Standard's gasoline offered for sale in such station.

That the purpose of the anti-trust laws is to protect competition has been stated many times. In *Apex Hosiery Co. v. Leader,* 310 U. S. 469, 500; 84 L. Ed. 1311, 1327 (1940), the Court said:

> *"Labor cases apart,* which will presently be discussed, this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, for the public wrongs which flow from *restraints of trade in the common law sense of restriction or suppression of commercial competition."* (Emphasis supplied.)

See also:

> *Standard Oil Company v. Federal Trade Commission,* 340 U. S. 231, 248, 249; 95 L. Ed. 239, 250, 251 (1951);
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> *William Goldman Theatres, Inc. v. Loew's, Inc.,* 150 F. 2d 738, 743 (C. C. A. 3, 1945).

The trade and custom for which there is *competition* between competitors is that of *customers.* Independent merchants operating their own service stations (as for example the 337 and 3-C dealers) are the *customers* for the petroleum products of various competing suppliers; and a restraint imposed by a supplier upon such customers could substantially affect competition. But the salaried employees in one of Standard's own stations are not the *customers* of Standard's competitors any more than they are the customers of Standard itself. Such employees are merely Standard's own representatives in its own stations. They are not independent businessmen. The trade and custom of such stations is Standard's trade and custom. Standard is not a customer of its competitors; Standard is their competitor. Accordingly, *U. S. v. Stan-*

dard Oil Company of California (*supra*) recognized that Standard's limitation upon its employees to sell only Standard's products in its own stations could not be a restraint of competition or of trade.

Differently stated, it is recognized that the trade and custom of a trade outlet owned or leased by a supplier of products and operated for that supplier by his own employees is the supplier's own trade and custom and the *outlet as so operated is not the subject matter of legitimate competition between that supplier and his competitors.* On the other hand, the trade and custom of independent merchants established in business and dealing at arm's length with various suppliers of products who compete with one another for such business *is* the subject matter of competition.

Few decided cases have dealt with the problem of what is and what is not the subject matter of competition. The following cases are illustrative of the two extremes:

Porto Rico Ry. Light & Power Co. v. Colom, 106 F. 2d 345 (C. C. A. 1, 1939); cert. den. 308 U. S. 617; 84 L. Ed. 516 (1939)

Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568; 67 L. Ed. 408 (1923)

Carter Carburetor Corporation v. Federal Trade Commission, 112 F. 2d 722 (C. C. A. 8, 1940)

United States v. Masonite Corporation, 316 U. S. 265; 86 L. Ed. 1461 (1942).

In *Porto Rico Ry. Light & Power Co. v. Colom,* 106 F. 2d 345 (C. C. A. 1, 1939); cert. den. 308 U. S. 617; 84 L. Ed. 516 (1939), the plaintiff power company sued to enjoin the insular government from making and dis-

tributing power for municipal purposes within plaintiff's franchise territory. Plaintiff relied on an agreement with the insular government wherein the latter agreed not directly or indirectly "to compete" with plaintiff within its franchise territory. In affirming a judgment denying the injunction, the Circuit Court of Appeals said (106 F. 2d 345, 353):

> "The appellant further insists that the introduction of electric power into the appellant's territory, as proposed and threatened, would constitute a breach of the non-competing agreement. * * * *Furnishing services to oneself does not constitute competition, as that term is generally accepted,* and furnishing power as contemplated for the insular government and the municipal purposes, is in effect a case of the insular government supplying itself." (Emphasis ours.)

Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568; 67 L. Ed. 408 (1923) involved a cease and desist order by the Federal Trade Commission under Section 5 of the Federal Trade Commission Act and Section 3 of the Clayton Act. The Commission's order found that Curtis had made contracts with 1,535 so-called "wholesale agents," by which the latter agreed to train, instruct and supervise an adequate force of boys for distributing Curtis' publications, and agreed to supply the demand of such boys and other dealers at specified prices, and agreed not to act as agent for or sell or supply to others at wholesale periodicals other than those published by Curtis. The Commission's cease and desist order applied only to 447 of the wholesale dealers who the Com-

mission found had, prior to entering into such contracts with Curtis, *been regularly engaged in the business of wholesale dealers in newspapers or magazines and as such were engaged in the sale or distribution of periodicals of other publishers.* The Supreme Court held that the contracts involved did not violate the Federal Trade Commission Act or the Clayton Act because of the intimate relationship between Curtis and the wholesale agents and the boys (the significance of which intimate relationship is discussed hereinafter).

The case is significant here in its disclosure that no attack was made upon Curtis' contracts with the balance of the 1,535 wholesale dealers who evidently were not considered to be the subject matter of competition since they had not been engaged in selling the periodicals of other publishers prior to their contracts with Curtis. The Supreme Court said (260 U. S. 568, 581; 67 L. Ed. 408, 413):

> "The Commission's report suggests no objection as to 1,088 of these representatives, who, prior to their contracts, had not been engaged in selling and distributing newspapers or periodicals for other publishers."

In *Carter Carburetor Corporation v. Federal Trade Commission,* 112 F. 2d 722 (C. C. A. 8, 1940), the Circuit Court of Appeals, in distinguishing the publishing company cases, made apparent that the trade and custom of independent merchants regularly established in business for their own account is the subject matter of competition, whereas the trade and commerce of a supplier's own

organization of salesmen is not so considered. The Court said (112 F. 2d 722, 736):

> "Petitioner has laid stress and reliance upon Curtis Publishing Co. v. Federal Trade Commission, 3 Cir., 270 F. 881, affirmed, Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568, 43 S. Ct. 210, 67 L. Ed. 408; and Pictorial Review Co. v. Curtis Publishing Co., D. C., 255 F. 206, but we find those cases inapplicable here and to be distinguished on the facts. It was there recognized that where a producer has built up his business by creating an organization of salesmen devoting their time exclusively to the distribution of his products, he may lawfully maintain the integrity of the organization as an exclusive selling agency. But in this case, the thousands of service stations involved are *established independent outlets* where the public has been accustomed to go for service on all makes of carburetors and other automobile equipment. Their specialization in ignition service ante-dated the specializing in carburetors. They are not and have never constituted an exclusive selling agency for Carter products. *The action of the petitioner was taken to coerce and compel them to change their character* and to narrow and limit their customary service to the public and to lessen, restrain and ultimately prevent the legitimate commerce of competitors whose goods were and had been moving in interstate commerce through this important outlet." (Emphasis supplied.)

In *United States v. Masonite Corporation,* 316 U. S. 265; 86 L. Ed. 1461 (1942), a similar distinction was made between a supplier's own business which is not the subject matter of competition and the sales organization of an independent business which is the subject matter of

competition. The Court said (316 U. S. 265, 279, 86 L. Ed. 1461, 1476):

> "Doubtless there is a proper area for utilization by a patentee of a *del credere* agent in the sale or disposition of the patented article. A patentee who employs such an agent to distribute his product certainly is not enlarging the scope of his patent privilege *if it may fairly be said that that distribution is part of the patentee's own business and operates only to secure to him the reward for his invention which Congress has provided. But where he utilizes the sales organization of another business—a business with which he has no intimate relationship*—quite different problems are posed since such a regimentation of a marketing system is peculiarly susceptible to the restraints of trade which the Sherman Act condemns. And when it is clear, as it is in this case, that the marketing systems utilized by means of the *del credere* agency agreements are those of competitors of the patentee and that the purpose is to fix prices at which the competitors may market the product, the device is without more an enlargement of the limited patent privilege and a violation of the Sherman Act." (Emphasis supplied.)

The doctrine above discussed has been extended and applied in various analogous situations where a restraint has been held lawful when imposed by the supplier upon persons who, while not employees in the strict sense of the term, nevertheless occupy such a *close and intimate relationship* to the supplier that in economic reality they are not independent businessmen and do not constitute a legitimate market or the subject matter of competition with competitors of the supplier. The situations will be discussed under each Act separately.

The situations to which the doctrine has thus been extended in cases involving restraints of trade under Section 1 of the Sherman Act and unfair methods of competition under Section 5 of the Federal Trade Commission Act are:

(a) Where There Is a Relationship of Principal and Agent Between the Supplier and the Person on Whom the Restriction Has Been Imposed.

United States v. General Electric Co., 272 U. S. 476; 71 L. Ed. 362 (1926);

United States v. General Electric Co., 82 Fed. Supp. 753 (D. C., N. J., 1949);

United States v. Masonite Corporation, 316 U. S. 265, 279; 86 L. Ed. 1461, 1476 (1942).[27]

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[27]Note that in the *General Electric* case, the agents as to whom the restraints were held valid were some 21,000 persons whom the Supreme Court recognized to be "those who ordinarily and usually would be merchants buying from the manufacturer and selling to the public." (272 U. S. 476, 483, 484; 71 L. Ed. 362, 368.) The Supreme Court also said (*id.* at 484, 485; *id.* at 368):

> "The circumstance that the agents were in their regular business wholesale or retail merchants and under a prior arrangement had bought the lamps and sold them as their owners did not prevent a change in their relation to the company."

Nevertheless, it would appear from the *Masonite Corporation* case that a supplier may not, as a *device* to avoid the operation and effect of the Sherman Act, designate *as agents*, independent merchants regularly established in businesses of their own with which businesses the supplier has no "intimate relationship."

(b) Where, Although There Is Not a Relationship of Principal and Agent Within Strict Common Law Concepts, Nevertheless There Is an Intimate Relationship of Trust and Fidelity Resulting From a Number of Factors as a Result of Which the Parties to the Restriction Do Not Occupy the Relationship of Mere Seller and Buyer Dealing at Arm's Length With One Another.

In *Appalachian Coals, Inc. v. United States,* 288 U. S. 344, 360, 361; 77 L. Ed. 825, 830 (1933), the Supreme Court said:

> "In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. 'The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains.' Board of Trade v. United States, 246 U. S. 231, 62 L. Ed. 683, 38 S. Ct. 242, Ann. Cas. 1918D, 1207 *supra. The familiar illustrations of partnerships, and enterprises fairly integrated in the interest of the promotion of commerce, at once occur.* The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions." (Emphasis supplied.)

In *United States v. Addyston Pipe & Steel Co.,* 85 Fed. 271, 280-282 (C. C. A. 6, 1898), the Court makes the following statements concerning exceptions to the common law rule against restraints of trade:

> ". . . After a time it became apparent to the people and the courts that it was in the interest of trade

that certain covenants in restraint of trade should be enforced. . . . Again, when two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged. Again, when one in business sold property with which the buyer might set up a rival business, it was certainly reasonable that the seller should be able to restrain the buyer from doing him an injury which, but for the sale, the buyer would be unable to inflict. *This was not reducing competition, but was only securing the seller against an increase of competition of his own creating.* Such an exception was necessary to promote the free purchase and sale of property. Again, it was of importance that business men and professional men should have every motive to employ the ablest assistants, and to instruct them thoroughly; but they would naturally be reluctant to do so unless such assistants were able to bind themselves not to set up a rival business in the vicinity after learning the details and secrets of the business of their employers." (Emphasis supplied.)

In *Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 568; 67 L. Ed. 408 (1923), it was held that exclusive dealing practices between Curtis and a number of wholesale agents and school boys selling Curtis' publications did not violate either Section 5 of the Federal Trade Commission Act or Section 3 of the Clayton Act in view of the intimate relationship between

them. In its discussion concerning Section 5 of the Federal Trade Commission Act forbidding "unfair methods of competition" (15 U. S. C. A. Sec. 45), the Supreme Court said (260 U. S. 568, 582; 67 L. Ed. 408, 414):

> "The mere selection of competent, successful, and exclusive representatives in the orderly course of development can give no just cause for complaint, and, when standing alone, certainly affords no ground for condemnation under the statute."

The nature of the relationship between Curtis and the wholesale agents and the school boys is discussed in detail in the decision of the Circuit Court of Appeals in the same case (270 Fed. 881 (C. C. A. 3, 1921)), in which emphasis was placed upon the following factors: the manner of selection and recruiting of the school boys and agents (pp. 887 and 889), the training program (p. 890), the promotion of the boys (pp. 890 and 891), Curtis' expenses and investment in the program (p. 891), and the arrangement for return of unsold publications (p. 907). In commenting on this relationship, the Circuit Court of Appeals said:

> ". . . The personal character of this work of the local distributing agents and the co-operation of the company's traveling agents, in the organization of this league of the boys, and the time, patience, and expenses expended in its formation, are fully set forth on the record, and show, beyond all question, that this widespread, novel, and effective selling organization of distributing agents and boy salesmen *is a part of the complainant's business*, fairly

and laboriously built up by it, and leaves no doubt that its morale, efficiency, and good will was a business asset, and in the distribution of magazines of great value, and its continuance and its success was, in the main, bottomed on the undivided loyalty of the local distributing agents and on their continuing to remain distributing agents of the Curtis Company alone." (Pp. 891 and 892.)

". . . The proofs show that the Curtis Company expended in the maintenance of districts agents and boys in the four years, 1914 to 1917, both inclusive, over $5,500,000, and they abundantly satisfy us that this *method of distribution* is an entity made up of the *joint activity and personal co-operation of district distributing agents and boy distributors and their relationship to the Curtis Company*, each one of the three being dependent upon the other two for the proper co-operating and interrelated distribution of the respondent's publications and promptly furnishing the same to the reading public, and that this plan originated with, and was built up by, the Curtis Company through years of patient effort and at great expense, and that it forms the basic, practical method of distributing and marketing the Curtis Company's publications and is a business asset of great value, and that the vital and basic element in this business is the undivided loyalty and personal interest and influence of the distributing agents." (Pp. 892 and 893.)

". . . It has therefore seemed to us that the unique character of the subject-matter of this contract, the object the publisher had in view, and the phraseology, conditions, and obligations of this contract, unite to make the contract one of consignment to a distributing agency, *who was furthering the*

business of his principals, and not one of a buyer, who thereby acquires title for his own individual purposes." (P. 908.)

". . . That company legitimately, and in course of fair business dealing, built up and recruits by its distributing district agents a selling agency of schoolboys, the whole efficiency of which consisted in undivided loyalty and single-hearted service, primarily of the district agents, and secondarily of the boys, to that company. The whole situation was unique. *This was not a case of commerce in the ordinary channels of salesmanship.* . . . There can be no doubt under the proofs that the Curtis Company, in building up this boy-selling organization through the distributing district agents, *was not throttling or indeed dealing with the ordinary channels of commerce*, but was enlarging the sphere of commerce by enlisting in its service the selling power of schoolboys, *who, but for this organization, would not only not have taken part in present commerce,* but who would have missed the commercial training the Curtis Company alone gave them for future commerce, and the Pictorial Company and the Crowell Company had no hand in giving them, and indeed it seems to us that these companies will, if this injunction here complained of was enforced, succeed in really throttling commerce, by disrupting and destroying an efficient agency which is extending commerce." (P. 912). (Emphasis supplied.)

See also:

Pictorial Review Co. v. Curtis Publishing Co., 255 Fed. 206 (D. C. N. Y., 1917);

Journal of Commerce Pub. Co. v. Tribune Co., 286 Fed. 111 (C. C. A. 7, 1922).

CLAYTON ACT, SECTION 3.

The same doctrine above discussed in relation to Section 1 of the Sherman Act is equally applicable to Section 3 of the Clayton Act.

It is to be noted particularly that Section 3 is not applicable to a situation unless it is shown that the goods or other commodities excluded by the "condition, agreement, or understanding" are those of a "competitor or competitors" of the seller. This necessarily assumes that "competitor or competitors" are such as to the trade and custom of the purchaser of the commodity; that is to say, that the trade and custom of the purchaser is, or but for the "condition, agreement, or understanding" would be, *the subject matter of competition* between the seller and his "competitor or competitors." Furthermore, the trade and custom of the purchaser must be shown to be the subject matter of competition between the seller and his competitors; since there could not otherwise be any substantial lessening of competition within the meaning of Section 3.

Since the language of Section 3 is limited to a "lease, sale, or contract for sale," the Section has been held to be inapplicable to a relationship of agency.

In *Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 568, 581; 67 L. Ed. 408, 413 (1923), the Court said:

> "Judged by its terms, we think this contract is one of agency, not of sale upon condition, and the record reveals no surrounding circumstances sufficient to give it a different character. This, of course, disposes of the charges under the Clayton Act."

In *Standard Fashion Co. v. Magrane-Houston*, 258 U. S. 346; 66 L. Ed. 653 (1922), contention was made that Section 3 of the Clayton Act was inapplicable since the contract involved was one of agency and not of sale. It was held by the Court, however, that under the circumstances there involved the contract was not one of agency but that "a sale was in fact intended and made."

We respectfully submit that the case last above cited cannot be interpreted, however, to mean that a true relationship of principal and agent within a strict common law definition of the term must be present to exclude the transaction from Section 3 of the Clayton Act. The so-called agents involved in *Standard Fashion Co. v. Magrane-Houston Co. (supra)*, appear to have been *independent dealers* established in business and their business was the subject matter of competition between the *Standard Fashion Co.* and its competitors. In the *Standard Fashion* case, the Supreme Court said (258 U. S. 346, 357; 66 L. Ed. 653, 658):

> "These courts put special stress upon the fact found that, of 52,000 so-called pattern agencies in the entire country, the petitioner, or its holding company, controlling it and two other pattern companies, approximately controlled two-fifths of such agencies. As the circuit court of appeals, summarizing the matter, pertinently observed:
>
> " 'The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities, amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose

purchases tend to give fashions their vogue may tend to facilitate further combinations; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business.' "

In other words, the *Standard Fashion* case imposed the same limitation on the agency doctrine for purposes of Section 3 of the Clayton Act as *United States v. Masonite Corporation,* 316 U. S. 265; 86 L. Ed. 1461 (1942) placed on such doctrine for purposes of Section 1 of the Sherman Act (see footnote 27 hereinabove and also the quotation from the *Masonite Corporation* case on page 61 of this Brief). It would appear that a supplier will not be permitted, as a device to avoid the impact of either of such sections, to designate as agents those independent merchants normally and regularly engaged in business and in buying from the competitors of such supplier.

On the other hand, it is apparent that the agency relationship which is not cognizable under Section 3 of the Clayton Act *is not limited to those situations where a principal and agent relationship in the strict common law sense is present.*

In *Curtis Publishing Co. v. Federal Trade Commission,* 270 Fed. 881 (C. C. A. 3, 1921), affirmed in 260 U. S. 568; 67 L. Ed. 408 (1923), the relationship between Curtis and its wholesale agents and groups of school boys, while not a relationship of principal and agent in the strict common law sense, was nevertheless held to be an agency for purposes of Section 3 of the Clayton Act.

Similarly, in *Pictorial Review Co. v. Curtis Publishing Co.,* 255 Fed. 206 (D. C. N. Y. 1917), the Court held

that although there was a sale of magazines by Curtis to the wholesale dealers, the agreement in substance established an agency relationship and that, therefore, there was no violation of the Clayton Act. In this connection, the Court said (255 Fed. 206, 208-210):

> "I can have no doubt that the district agents or wholesalers who receive from the defendant the Ladies' Home Journal and put it on the market are purchasers of the magazine. There can be no question, in view of the payment in advance and the other elements of the transaction, that title to the magazines which these wholesale agents receive passes to them. *They are not mere factors or agents. Nevertheless they are clearly much more than purchasers.* The prime characteristic of the Curtis system is to market the defendant's magazines through newsboys, and to develop an efficient body of these boys by a proper selection in the first place, by keeping them in good surroundings, by appealing to their ambition through conferring ranks and prizes in case of success, and by obtaining good business positions for those who have retired. There is no doubt that by means of this system the sale of the defendant's magazines is greatly increased.
>
> "If nothing but a sale were involved, I might support complainant's contention that defendant has violated the Clayton Act by preventing its wholesale dealers from selling the Pictorial Review through subdealers and boys; but what complainant evidently desires is, not merely to sell to these wholesalers, which it can do already in cases where the wholesalers have a retail trade, and to the extent of that retail trade, but to avail itself of the organization of the Curtis boys, built up by the ingenuity, labor, and capital of the defendant. The defendant,

in insisting upon maintaining the integrity of its system, is not in my opinion guilty of unfair trade. On the contrary, the complainant, in attempting to avail itself of this system, is engaging in unfair trade. That it cannot build up a system of its own, if it desires to do so and will go to the trouble and expense, I do not believe. It is attempting here to secure a preliminary injunction to prevent the defendant from contracting with the latter's district agents not to market the Pictorial Review through boys and dealers. To grant such an injunction would break up what I think is a perfectly legitimate system for the promotion of sales of the defendant's magazines, and would enable the complainant, without expense, to employ the organization built up and fostered by the defendant.

". . . *The principal reason, doubtless, for selling the magazines to the district agents, rather than making consignments, with consequent financial risks, is one of safety and simplicity, and is not sufficient, in my opinion, to subject the relations of the parties in all respects to those of mere vendor and vendee.*

". . . *Looking behind the form of the contract which the defendant makes with its agents to the inherent features of the transaction, I think it may be said that the selling arrangement more nearly resembles an agency conducted by district agents in co-operation with the Curtis boys than it does an outright sale to the district agents and nothing more.* . . ." (Emphasis supplied.)

See also:

Journal of Commerce Pub. Co. v. Tribune Co., 286 Fed. 111 (C. C. A. 7, 1922);

Staroske v. Pulitzer Pub. Co., 235 Mo. 67, 138 S. W. 36 (1911).

We believe that the following language of the Supreme Court in the *Masonite Corporation* case is particularly appropriate, notwithstanding it deals with the Sherman Act:

> "So far as the Sherman Act is concerned the result must turn not on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices *in terms of restraint of trade.*" (Emphasis supplied.) (316 U. S. 265, 280; 86 L. Ed. 1461, 1476.)

(2) WITHIN THE FRAMEWORK OF INQUIRY OF WHETHER OR NOT THE BUSINESS OF THE L. O. STATIONS IS A LEGITIMATE MARKET FOR ANTI-TRUST PURPOSES, THE RELATIONSHIP BETWEEN RICHFIELD AND THE L. O. OPERATORS CONTAINS ALL THE SAME ATTRIBUTES AS RELATIONSHIPS OF AGENCY OR EMPLOYMENT.

If the L. O. operators were agents or employees within the strict common law definitions (and Richfield, of course, has not contended that they are) there would be no problem here presented under either Section 1 of the Sherman Act or Section 3 of the Clayton Act. But the fact that they are not such agents or employees is not determinative of the issue in this case. Similarly, the facts found by the District Court that Richfield does not pay them wages or regard them as employees for purposes of workmen's compensation insurance or social security taxes [Finding 11, R. 142] and the facts enumerated in Finding 10 [R. 141-2] showing that the operators bear some of the expenses relating to the operation of the stations are not determinative of the issue in this case. The issue to be determined in this litigation is whether, *for purposes of the anti-trust laws,* the rela-

tionship of the operator to Richfield more nearly resembles (a) that of agency or employment or the other "intimate relationships" above discussed, or (b) that of an independent businessman who is a customer of and a part of the market for both Richfield and its competitors.

When the issue is so framed,[28] there can be little doubt that the L. O. operators are not customers or a legitimate market for Richfield's competitors.

None of the facets of the relationship[29] (excepting the sole incident of the passage of title to the petroleum products from Richfield to the operator, hereinafter discussed) is of a nature or character common to that of seller and buyer or supplier and customer. Consider the manner of the selection by Richfield of prospective operators. Sellers do not normally investigate the character, family life or habits of their customers. Nor do they receive from them

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[28]As distinguished from the issue as framed by the District Court in its Opinion; *i. e.*, whether the L. O. operator is (a) an employee or agent or (b) a tenant and independent contractor.

[29]See the description of these facets in the Statement on pages 12 to 19, hereinabove.

Error was assigned to the failure of the District Court to make findings of such facts, proved by uncontradicted evidence of witnesses for both Richfield and the government. [Assignments of Error I(5) and (6); R. 197-201.] Motion by Richfield under F. R. C. P. 52 that the District Court make findings of such facts was denied. [R. 193.]

When a trial court neglects to find a fact material to the determination of the cause, such neglect is equivalent to a ruling that such fact is immaterial. This presents a question of law which is a proper subject of review. (*The Francis Wright*, 105 U. S. 381, 387; 26 L. Ed. 1100, 1101, 1102 (1882); *The E. A. Packer*, 140 U. S. 360, 364; 35 L. Ed. 453, 456 (1891); *The City of New York*, 147 U. S. 72, 77; 37 L. Ed. 84, 87 (1893).)

applications resembling employment applications. Consider that Richfield has furnished to the operator a fully equipped service station at substantially less than its fair rental value, and whether that is a common incident of a buyer and seller relationship. Consider that "few, if any" of the L. O. operators had been independent dealers in their own stations prior to becoming L. O. operators in Richfield's stations [R. 1586-7], significant in its proof that such men had not formerly been customers of Richfield or others and subsequently converted by Richfield to a different status. Consider that before the prospective operator is installed in Richfield's station, he is informed that the manner of his operation of the station must conform to Richfield's requirements in a variety of matters and that his occupancy of the station may be terminated on 24-hours' notice. Consider that Richfield's control over the operator's activities is freely accepted and is not superimposed by the mere exercise of power on a relationship otherwise independent. Consider the arrangements Richfield makes with the operator for disposal or return of unsold Richfield petroleum products and approved TBA and tools. Consider that the prospective operator before he commences operation of the station is informed and knows that he will not be permitted to develop good will or make any charge for intangible business value to any successor operator. Consider the constant supervision, instruction and direction of the operator after his installation in the station. And finally, consider the types of financial assistance furnished by Richfield to the operators by which Richfield takes off their shoulders many of the financial risks of doing business and in effect guarantees them income on a basis more secure than the commissions ordinarily receivable by an agent.

In an article by F. R. Black in 29 Georgetown Law Journal 439 (1941) entitled "Exclusive Dealer Devices in the Marketing of Petroleum Products"[30] the author states that it is "grotesque" to claim that the operator of a station having most of the attributes of one of Richfield's L. O. stations is "an independent dealer" (pp. 450-451). For lack of a definition by courts of an independent business man, we quote the definition of Mr. Black (pp. 450-451):

> "It is common knowledge that an independent business operator has certain rights and privileges among them being, (a) the right to buy in a competitive market and deal with several companies, if he so desires; (b) the right to select his own fixtures and equipment; (c) to determine his own sales policy; (d) his method of advertising; (e) the manner of display of his products; (f) the good will of his business is his own, transferable at pleasure and for a consideration satisfactory to him; and (g) the continuation of his business is not dependent on the will of another."

When the factors present in the instant case are compared with the factors deemed important in the authorities above cited (particularly in the publishing company cases) and with those deemed important in the definition of an independent business man above quoted, it will be observed that in his relationship to Richfield, the L. O.

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[30]Richfield would contest most vigorously any contention that the purposes or objectives which Mr. Black ascribes to the creators of the so-called "Iowa Plan" there discussed have motivated Richfield in the creation or operation of the L. O. stations; and there is no finding of fact in this case of any of such motives or intentions on Richfield's part, and no evidence from which any such finding could validly be made.

operator is neither an independent business man nor a customer of Richfield or of its competitors.

It was shown at the trial that title to gasoline and other petroleum products delivered to the L. O. operators is not reserved by Richfield until sale by them. Title to the products passes to the operators on delivery. But the presence of the mere incident of the passage of title does not preclude a relationship from being considered one of agency for particular purposes and within particular frameworks of inquiry. The nature of the relationship is determined from the realities of the situation. Various cases, in addition to the publishing company cases above discussed, have held that the element of passage of title is not determinative of whether or not the relationship is one of agency. In the following cases, although not involving the anti-trust Acts, the Courts have held that an agency relation existed for various purposes notwithstanding the use of particular words or the incident of the passage of title:

Willcox & Gibbs Sewing Machine Co. v. Ewing, 141 U. S. 627, 635-637; 35 L. Ed. 882, 885 and 886 (1891);

Bendix Home Appliances v. Radio Accessories Co., 129 F. 2d 177, 181 (C. C. A. 8, 1942);

Marrinan Medical Supply v. Ft. Dodge Serum Co., 47 F. 2d 458 (C. C. A. 8, 1931);

Carroll Electric Co. v. Freed-Eisemann Radio Corporation, 50 F. 2d 993, 994 (C. A. D. C., 1931);

Moore Machinery Co. v. Stewart-Warner Corp., 27 Fed. Supp. 526, 529 (D. C. Cal., 1939);

Kane v. Chrysler Corporation, 80 Fed. Supp. 360, 363 (D. C. Del., 1948);

Philips v. United States, 59 F. 2d 881, 885 (C. A. D. C., 1932).

(3) THE DISTRICT COURT'S DECISION WAS BASED ON CERTAIN PREMISES WHICH ARE DEMONSTRABLY FALLACIOUS.

(a) The District Judge Erroneously Held That the Issues Here Involved Had Been Determined, in a Manner Adverse to Richfield's Contentions, in Standard Oil Company of California v. United States, 337 U. S. 293; 93 L. Ed. 1371.[31]

But analysis of the *Standard* case shows that the problems and issues here raised were not there presented, considered or discussed.

The *Standard* case involved (in addition to the 1063 employee operated stations) 5937 stations, of which 1800 were subleased by Standard to the operators under a sublease providing for exclusive dealing, and the remainder of which were covered by written contracts also providing for exclusive dealing. (78 Fed. Supp. 850, 854.) Of the 1800 stations so subleased by Standard, only 23 were owned by Standard. [Transcript of Record on Appeal to U. S. Supreme Court, Ex. 6-D, pp. 1315, 211.] It does not appear from the case that the remaining 1,777 stations subleased by Standard to dealers were not similar in nature to the 3-C stations here involved, *i. e.*, independent outlets originally leased by Standard from the same dealers who owned or controlled such outlets.

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[31]The District Court's Opinion states: "It [the inquiry] is reduced to the problem whether the agreements through which this commerce was handled are of the type condemned by the decision in the Standard Oil case, decided by me in 1948, and affirmed by the Supreme Court." [R. 76.]

The Opinion states further: "And the relationship is no different than that found in the 'leased-out' stations in the Standard case." [R. 80.]

Assuming, however, that the 1,777 stations were like the L. O. stations to the extent that each of Standard's sublessees was a person other than the owner, nevertheless no contention was made either in the District Court or on appeal to the Supreme Court that the 1800 sublessees from Standard were not independent businessmen.[32] There was no issue or contention that the functional relationship between Standard and the lessees of Standard's stations differed in any respect from the relationship between Standard and the service station dealers who owned their own stations and purchased products from Standard under the exclusive dealing contracts there involved.[33] No contention was made by defendant Standard in that action that there was any intimate relationship between it, as lessor, and the service station lessees there involved, or that as lessor, Standard either reserved or exercised the right of control over the manner of operation of the service stations by the lessees; nor did it appear that any of such leases were terminable by either the lessor or the tenant on short term notice.[34] Nor did it appear that rentals paid by Standard's lessees were substantially less than the fair rental value of the stations.

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[32]Standard had admitted in paragraph 13 of its Answer [Transcript of Record on Appeal to U. S. Supreme Court, p. 91]:

> "That approximately 1800 of said service stations are leased to *independent operators* by leases which obligate the lessee to handle and sell * * *."

[33]While nomenclature is inconclusive, Standard did refer alike to its sublessees and non-sublessees as "independent dealers." [See Ex. 6-D prepared by Standard, Transcript on Appeal to Supreme Court, pp. 1315, 211.]

[34]Standard's contracts were for varying specified terms or from year to year. The year to year instruments were terminable every six months upon thirty days' advance notice. (*Standard Oil Company of California v. United States*, 337 U. S. 293, 296; 93 L. Ed. 1371, 1377.)

The issue on appeal in the *Standard* case concerned *the nature of the proof* necessary to sustain a determination of the illegality of exclusive dealing provisions contained both in sales contracts and in subleases, and without any differentiation between them for the purpose of that issue. The Court said (*id.* at 299; *id.* at 1378):

> "The issue before us, therefore, is whether the requirement of showing that the effect of the agreements 'may be to substantially lessen competition' may be met simply by proof that a substantial portion of commerce is affected or whether it must also be demonstrated that competitive activity has actually diminished or probably will diminish."

The Supreme Court's decision recognized, however, that if an agency or employment relationship exists, any exclusive dealing required by the principal or employer would not violate Section 3 of the Clayton Act.[35]

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[35]The Court said (*id.* at 303; *id.* at 1380):

> ". . . The third—*Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 568, 67 L. Ed. 408, 43 S. Ct. 210—went off on the ground that the contract involved was one of agency and so is of no present relevance."

The Court said (*id.* at 310; *id.* at 1384):

> ". . . Before the system of requirements contracts was instituted, Standard sold gasoline through independent service-station operators as its agents, and it might revert to this system if the judgment below were sustained. Or it might, as opportunity presented itself, add service stations now operated independently to the number managed by its subsidiary, Standard Stations, Inc. From the point of view of maintaining or extending competitive advantage, either of these alternatives would be just as effective as the use of requirements contracts, although of course in so far as they resulted in a tendency to monopoly they might encounter the anti-monopoly provisions of the Sherman Act. See *United States v. Aluminum Co. of America*, 148 F. 2d 416 (C. C. A. 2d Cir.)."

The Court said (*id.* at 311; *id.* at 1385):

In summary, the *Standard* case is dissimilar from a factual standpoint; and the legal issues here raised were not there involved. It does not support the District Court's decision here; but on the contrary, in its recognition that agency and employment relationships are excluded from the application of Section 3 of the Clayton Act, it supports Richfield's contentions.

"Though it may be that such an alternative to the present system of buying out of independent dealers and making them dependent employees of Standard Stations, Inc., would be a greater detriment to the public interest than perpetuation of the system, this is an issue, like the choice between greater efficiency and freer competition, that has not been submitted to our decision."

The Court said (*id.* at 298; *id.* at 1378):

"Given such quantitative substantiality, the substantial lessening of competition—so the court reasoned—is an automatic result, for the very existence of such contracts denies dealers opportunity to deal in the products of competing suppliers and excludes suppliers from access to the *outlets controlled by those dealers.*" (Emphasis supplied.)

Note that the language above quoted suggests that an agency or employment relationship (in absence of a monopoly aspect) would not violate the Acts even if applied to persons who were independent merchants in their own stations and whose character as such was changed by arrangement with the supplier. The instant case does not require a decision of that scope. The L. O. operators were not theretofore independent businessmen in stations owned or controlled by them; and the L. O. stations themselves were not outlets formerly operated by independent businessmen.

It should be noted also that the instant case cannot involve the application of that portion of the language above quoted, to wit: "although of course in so far as they resulted in a tendency to monopoly they might encounter the anti-monopoly provisions of the Sherman Act." The complaint is devoid of any charge under Section 2 of the Sherman Act of monopoly or attempted monopoly or purpose to effect monopoly; and the case therefore involves no issue of such nature. Furthermore, the entire record in this case discloses the very opposite of monopoly, both in purpose and effect. See Statement pp. 11 to 13 hereinabove for a discussion of Richfield's purpose in having and acquiring L. O. stations. Note also that the number of L. O. stations in existence as of December 31 of 1950 was less than the number of L. O. stations as of December 31 of 1940 or 1941. [Ex. 26-A; R. 323, 1540.]

(b) The District Judge Ruled That the L. O. Operators Are "Independent,"[36] Not by Determining Their Relationship to Richfield in the Light of All the Circumstances Here Present and Above Discussed, but by Considering Decisive the Existence of the Printed Form of Lease.

The District Court's Opinion emphasizes that the relationship is landlord and tenant, from which it reasoned that the operator could not be otherwise than independent. The Opinion states (emphasis supplied):

> "The foundation of the relations was the service station lease, denominated form 542."[37] [R. 78.]

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[36]By so ruling that the L. O. Operators are independent (even though such ruling was erroneous), the District Court tacitly recognized and acknowledged the validity of Richfield's basic premise; *i. e.*, that an essential element of illegality of an exclusive dealing restriction imposed by a supplier upon a person is the determination that such person is an independent businessman, and that his trade be the subject matter of competition.

The government likewise recognized in its complaint that since it had not charged Richfield with monopoly or conspiracy or specific intent to violate anti-trust laws, Richfield's contracts with the L. O. operators could violate those acts only if (a) the L. O. operators were independent businessmen, and (b) the business of the L. O. stations was a legitimate market and the subject matter of competition so that competitors could be injured by being foreclosed access therefrom. The complaint so charged in paragraphs 7, 13 and 21. [R. 2-8.]

[37]The provisions of the service station lease are incorrectly described in the following material respect in the District Court's Opinion:

> "The *habendum* clause of each lease leases the described real property and the improvements and facilities thereon to the designated lessee *for a definite period of time*, subject to 24 hours' termination clause. . . ." [Opinion, R. 78.]
>
> "For we have a relation which is the result of specific agreement, which calls for (a) *a fixed term*, . . ." [Opinion, R. 79.] (Emphasis supplied.)

There is no definite or fixed period in any lease of an L. O. station; the leases provide merely for continuation indefinitely until terminated on 24 hours' notice. [Exs. 1-B, 1-D, 1-E and 1-G; R. 243-4, 246-7, 248-9, 251-2, 567.]

"But when, through a formal and written instrument, *a relationship is established by which the exclusive possession and control of the property is turned over to another,* in exchange for a specified rental with full responsibility for the conduct of the business falling upon the lessee, with all profit or loss accruing entirely to him and not to the transferor,[38] the relationship satisfies all the requirements of an independent enterprise." [R. 80-1.]

"So Richfield cannot, *by creating the relationship of landlord and tenant,* long and anciently known to our law, with all the responsibilities that such relationship imposes on the transferee, restrain trade through an outlet by imposing illegitimate oral contracts which restrict the transferee to the handling of Richfield products or Richfield's sponsored products." [R. 89.]

"It follows that the L. O. operators are, *by the instrument of their creation,* independent business men, as that concept is understood in anti-trust law, * * *." [R. 89.]

The District Court's determination of the existence of a landlord-tenant relationship is predicated upon the L. O. operators having "exclusive possession of the premises against all the world, including the owner, . . ." [R. 79.] That the L. O. operator does have this right under

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[38]This statement concerning "all profit and loss" is unjustified in view of the undisputed proof of financial assistance given by Richfield to the L. O. operators of such nature that Richfield assumes the more consequential hazards of the business done by the operators. The assistance furnished by Richfield includes the subsidies at times of price wars, the low basic rental, the waivers of rental and rental reductions, etc., described in the Statement, on pages 17 to 19 hereinabove.

the terms of his arrangement with Richfield is, at best, most doubtful.

But grant that the Form 542 instrument [Exs. 1-B, 1-D, 1-E and 1-G; R. 243-4, 246-7, 248-9, 251-2, 567] is a lease and that it does create the "relationship of landlord and tenant," albeit on a 24-hours' termination basis. Acceptance of that classification for purposes of the incidents of the law of landlord and tenant does not carry with it, as the District Court fallaciously assumed, a concomitant determination that for purposes of the application of the anti-trust laws the L. O. operator is an independent business man.

Various cases have considered facts similar to those here presented, but within other frameworks of inquiry, and have determined that, *notwithstanding the existence of a lease or a landlord-tenant relationship,* the true relationship more closely resembles that of master and servant. The basis of such holding in each instance was the recognition of the control exercised by the lessor oil company over and beyond rights accruing from a simple landlord and tenant relationship.[39]

The different fields of law or frameworks of inquiry which such cases involved are:

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[39]It is significant that in many of such cases the oil company asserted unsuccessfully that the person in the position of the L. O. operator was not "controlled" or was an "independent contractor" on the grounds that he was a *lessee,* that he paid a specified rental for the station, that he paid the salaries and wages of his employees and helpers, that he assumed responsibility for and agreed to indemnify the oil company lessor for claims due to his negligence and other grounds.

(1') *Whether the Operator of an L. O. Station and the Helpers of Such Operator Are Employees of the Oil Company for Purposes of the Workmen's Compensation Acts.*

Continental Oil Co. v. Sirhall, 122 Colo. 332; 222 P. 2d 612 (1950);[40]

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[40]Here a helper of the oil company's lessee was injured and was held to be an employee of the oil company lessor under the Colorado Workmen's Compensation Act. The Court said:

> "We have repeatedly held that this section is valid and that thereby an obligation may, in proper case, be imposed against an owner *where the common-law relationship of employer and employee does not exist, in that one may be an employee by virtue of the statute, for the purpose of workmen's compensation, when in fact he is not an employee by common-law definition."* (Emphasis supplied.) (*Continental Oil Co. v. Sirhall,* 122 Colo. 332, 333; 222 P. 2d 612, 613 (1950).)

The Court took pains to point out that the fact that Continental was the lessor to Miller did "not of itself create liability." The Court held that to make a lessor liable under the Colorado Act, "there must be facts showing that he is operating, engaged in, or conducting his business by leasing; not merely that he is a lessor." The Court held that under the circumstances Continental "was operating its business by leasing part of the work of its business to a lessee." (*Id.* at 335; *id.* at 613.)

Significant in its application to the difference between Richfield's relationship to its L. O. operators in Richfield's stations on the one hand and to the 337 and 3-C dealers in their own stations is the discussion in the *Continental* case of an earlier Colorado case, *Bukowich v. Ford Motor Co.,* 99 Colo. 56, 59 P. 2d 470 (1936). In the *Bukowich* case, the Colorado court had held that the employee of a dealer in Ford Motor Company's products under a written sales contract was not to be considered an employee of the Ford Motor Company under the Colorado Workmen's Compensation Act. The *Continental* case distinguished the *Bukowich* case as follows:

> "In that case no question of operating a business by leasing was involved. There, Ford Motor Company did not own either the building or the equipment. Both were held by the local dealer either by virtue of ownership or of lease from some other person without power of termination by the company; there the sale of the Ford Motor Company products is not shown to have been the dominant part of the dealer's

Bieluczyk v. Crown Petroleum Corp., 134 Conn. 461; 58 Atl. 2d 380 (1948).[41]

(2') ***Whether the Oil Company Maintains Sufficient Control Over the Operators of L. O. Stations and Their Helpers to Subject the Oil Company to Liability for Chain Store Taxes in States Having Such Legislation.***

Maxwell v. Shell Eastern Petroleum Products, Inc., 90 F. 2d 39 (C. C. A. 4, 1937);

Standard Oil Co. v. State Board of Equalization, 110 Mont. 5; 99 P. 2d 229 (1940);[42]

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business. . . . Had that company [Ford Motor Company] owned and leased to the dealer a building equipped and adapted principally to the display, sale and service of Ford Motor Company products, by short term lease, and had the dealer's business been restricted almost exclusively to the sale of such products, then the situation might have been analogous to that here presented." (*Id.* at 336; *id.* at 614.)

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[41]Here the Court stated (*id.* at 468; *id.* at 384):

"The occupancy of the premises by Toomajian with the defendant's permission, for which he paid, falls within the general definition of a landlord and tenant relationship, 51 C. J. S., Landlord & Tenants, §1; but it is clear upon the facts found that the contract was really one of agency and that the use of the premises was incidental, a permissive use rather than one which gave an exclusive interest in the land. See *Guiel v. Barnes*, 100 Conn. 737, 742, 125 A. 91; 1 Underhill, Landlord & Tenant, §§210, 211, 213."

[42]The Montana chain store license tax law defined a store to include any establishment "owned, operated, maintained or controlled by the same person, firm, corporation, . . . in which goods, wares or merchandise or petroleum products of any kind, are sold, either at retail or wholesale."

The oil company there contended that its only connection with the stations was owning the parcels of land and leasing them "to independent persons" who in turn retailed the commodities sold to them by the oil company. The Court rejected Standard's conten-

Midwestern Petroleum Corp. v. State Board of Tax Commissioners, 206 Ind. 688; 187 N. E. 882 (1933).

When all of the indicia of Richfield's relationship with the L. O. operators are considered, the conclusion is inescapable that, notwithstanding the existence of a lease, the L. O. operator in his operation of the station is no more an independent merchant than would be a salaried employee or agent installed therein by Richfield.

(c) The District Judge Determined That the "Form" of the Transaction Chosen by Richfield (the 24-hour Lease) Prevents Richfield From Denying to the L. O. Operators the Right to Deal in Non-Richfield Products.[43]

The portion of the District Court's Opinion quoted in Footnote 43 illuminates the fallacy of its reasoning. The Court's statements prove that this is not a case where the Court painstakingly looked for reality and substance be-

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tion that the Act did not apply because the relationship between it and the operator was landlord and tenant:

> "As we have indicated, the record shows that the primary purpose of the plaintiff in its ownership of the stations and the arrangements under which the stations are leased is to secure the sale of the products of the plaintiff. That fact differentiates the position of the plaintiff and that of the ordinary landlord renting out property for retail store purposes. The ordinary landlord is compensated only by the rental received for the property." (*Standard Oil Co. v. State Board of Equalization,* 110 Mont. 5, 18; 99 P. 2d 229, 233 (1940).)

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[43]The Opinion states:

> "So Richfield cannot, by creating the relationship of landlord and tenant, long and anciently known to our law, with all the responsibilities that such relationship imposes on the transferee, restrain trade through that outlet by imposing illegitimate oral contracts which restrict the transferee to the handling of Richfield's products or Richfield's sponsored prod-

hind a form valid on its face. On the contrary, the District Court ignored the reality of the relationship and held that it is the form itself which creates the violation of the statutes. Assume that instead of a *lease* terminable on twenty-four hours' notice, either no written instrument at all had been used with the L. O. operators or that a written *license* containing comparable provisions had been required by Richfield before it permitted a prospective operator to enter its station. We respectfully submit that such difference in form, although it would eliminate the basis relied upon by the District Court for its determination of illegality, would not *in economic reality or in terms of restraint of trade* affect substantially the real issue whether the L. O. operator is an independent businessman or a legitimate market.

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ucts. Even if it be admitted that if the outlet were its 'exclusive agency,' the limitation could be imposed as an incident of ownership, *under the form it has chosen,* Richfield cannot deny to the dealers the right to deal with other suppliers as to their products, or to deny to such suppliers access to the dealers, so that these varied products may reach the public, whose protection the anti-trust laws seek." (Emphasis supplied.) [R. 89.]

The Opinion also states:

"And the obvious answer to the claim of ownership is the same which Courts give in tax cases to the contentions of taxpayers who, after having chosen to do business under a certain form of organization, try to have us disregard it, on the ground that they were, in reality, 'doing business with themselves.' And the answer is that a person choosing a particular entity in order to achieve certain results is not in a position to ask us to disregard it, when he wishes to avoid results unanticipated.

"So Richfield is tied to the form they chose. And if it does not give them immunity from the admitted restraints they impose through it, they must bear the consequences of their voluntary act, regardless of any contrary intention they may have had in choosing it." (Emphasis supplied.) [R. 85.]

The tax cases to which the Court refers are not apposite. The tax laws expressly distinguish between corporations and individuals in determining not only the rates of taxes but the manner and method thereof. The courts have consistently held that if a corporation is unreal or a sham, its identity may be disregarded for income tax purposes when necessary to protect the revenue. The courts have also held in tax cases that the taxpayer, however, cannot in turn demand that the corporate entity created by him be disregarded for tax purposes. (*Higgins v. Smith*, 308 U. S. 473, 477; 84 L. Ed. 406, 411 (1940); *Moline Properties v. Commissioner of Internal Revenue*, 319 U. S. 436, 439; 87 L. Ed. 1499, 1503 (1943).) The rule that a taxpayer cannot disregard the corporate entity created by him has no application to the instant situation because the rule is predicated on the fact that the form (corporate) selected by the taxpayer is squarely and expressly made the subject of legislation, and the tax results flow automatically from the mere existence of the corporation. The anti-trust laws, on the other hand, do not contain any comparable provision to the effect that certain anti-trust penalties will attend or flow from the creation of a lease of real property.

Nor is it true, as suggested by the District Court, that Richfield contended that its right to control the products sold by the L. O. operators at the L. O. stations was justified by Richfield's "ownership" of the stations. Richfield did not and does not so contend that the incident of ownership alone would justify such result. Richfield's con-

tention was and is that the nature of the relationship between Richfield and the L. O. operators must be determined by a consideration of all of the facts and circumstances and cannot be determined by any one facet or circumstance.

(d) The District Court's Determination [Conclusions of Law 6 and 9, R. 136-41] that the L. O. Stations Constitute a Substantial Market for Richfield's Competitors Was Erroneous.

The District Court failed to perceive that while the 337 and 3-C stations, owned and operated as they are by independent businessmen, are a legitimate market, the L. O. stations are not a market at all but merely Richfield's outlet to a market, *i. e.*, the motoring public.

The restrictions on the L. O. operators did not affect Richfield's competitors in their access to the motoring public any more than if the operators had been Richfield's salaried employees or agents handling consigned gasoline and operating on a commission basis. The testimony of the government's competitor witnesses that they had difficulty in selling lubricating oil and automotive accessories to the L. O. operators does not prove that such stations are a legitimate market for their products. Competitor salesmen admitted that they knew that L. O. stations were owned or leased by Richfield and that the operators were forbidden by Richfield to buy competitive products.[44] Their efforts to sell products to the L. O. operators through the back door proves merely that they were attempting a form of bootlegging. Comparable would be

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[44]See testimony of Ellis, Pennzoil salesman [R. 950]; Ransome, tire salesman [R. 1349-51]; and Behm, tire salesman [R. 1465-6].

an effort by Macy's department store to sell its merchandise to the salaried employees of its competitor Gimbel's for resale over Gimbel's counters. That Gimbel's forbids such occurrence neither shocks the conscience nor violates the anti-trust laws.

(e) The Cases of Timken Roller Bearing Co. v. United States, 341 U. S. 593; 95 L. Ed. 1199 (1951), and Kiefer-Stewart v. Seagram, 340 U. S. 211; 95 L. Ed. 219 (1951), Relied Upon by the District Court, Are Clearly Distinguishable.

In *Kiefer-Stewart v. Seagram,* 340 U. S. 211, 215; 95 L. Ed. 219, 224 (1951), it was held that an agreement between competitors Seagram and Calvert to sell liquor only to those wholesalers who would resell at fixed prices was an unlawful *conspiracy* under Section 1 of the Sherman Act; and that the fact of stock affiliation between Seagram and Calvert did not "make it impossible for them to have conspired in a manner forbidden by the Sherman Act."

Similarly, in *Timken Roller Bearing Co. v. United States,* 341 U. S. 593, 598; 95 L. Ed. 1199, 1206 (1951), it was held that stock affiliation between American Timken, British Timken and French Timken did not prevent a determination of *conspiracy* under Sections 1 and 3 of the Sherman Act under circumstances where the three companies, two of which were originally wholly independent and competing companies, had agreed to (1) the allocation of territories; (2) price fixing; (3) elimination of competition between themselves and cooperation to eliminate the competition of outsiders; and (4) participation in cartels to restrict imports to and exports from the United States.

Since there is no charge or issue of *conspiracy* in the Richfield action, the only conceivable point of resemblance in either such cases was the contention of American Timken Company that the restraints of trade above listed were "reasonable" because they were ancillary to a "joint venture." The Supreme Court properly rejected "the proposition that agreements between legally separate persons and companies *to suppress competition among themselves and others* can be justified by labeling the project a 'joint venture.'" (Emphasis supplied.) 341 U. S. at 598; 95 L. Ed. at 1206.

The above quoted language itself identifies the vital difference between the Timken and Richfield situations. Nowhere in the Richfield case can be found an arrangement between *competitors*, as in the *Timken* case, either to suppress or eliminate competition between themselves or to suppress the competition of others. The *Timken* case is merely an extension of the same doctrine above discussed that one will not be permitted, as a *device* to avoid what would otherwise be illegal under the anti-trust laws (either a restraint imposed upon competitors, as in *U. S. v. Masonite Corporation*, 316 U. S. 265, 279; 86 L. Ed. 1461, 1476, or a restraint imposed upon independent merchants who are the legitimate subject matter of competition, as in *Standard Fashion Co. v. Magrane-Houston*, 258 U. S. 346; 66 L. Ed. 653, and in *Carter Carburetor Corporation v. Federal Trade Commission*, 112 F. 2d 722), to assert that the other party is an agent or a joint venturer. The *Timken* case would be more apposite if Richfield had imposed unlawful restraints of exclusive dealing on the 337 and 3-C dealers who are independent merchants in their own places of business and had then at-

tempted to immunize the unlawful act by asserting a specious relationship of "joint venture" or agency.

The District Court erroneously thought that the element of illegality otherwise missing in the Richfield-L. O. situation was provided by the factor of control by Richfield over the L. O. operators. The Opinion emphasizes the statement made in the *Timken* and *Kiefer-Stewart* cases that "common ownership and control does not liberate corporations from the impact of the anti-trust laws." [R. 81-2.] The Opinion states further:

> "To follow it [Richfield's contention] would mean to turn defiance of law into a virtue, to make legitimate the very *means* of restraint. Granted that a business may create its own outlets, it can do so only by making them *its agency in truth and in fact.* It cannot do so by creating a well recognized legal estate, superimpose on it the oral limitations, the object of which is to restrain trade, and then claim legitimacy for this very restraint." (Emphasis by Court.) [R. 89.]

But it is obvious that the vice in a restraint of trade does not lie in the control itself. The stringent controls upon an employee or bona fide agent are not illegal, notwithstanding that they are also the "very means" of restraint. The vice in a restriction exists in its imposition either upon competitors (as in the *Timken* and *Masonite* cases) or upon independent business men whose trade is the subject matter of legitimate competition (as in the *Standard Fashion* and *Carter Carburetor* cases).

(f) The District Court in That Portion of Its Opinion Entitled "The Created Market" [R. 86 to 90] Misconstrued and Misstated Richfield's Contentions.

The Court's Opinion states:

> "Richfield contends that it 'created' these instrumentalities for its own purpose. For this reason, they argue that there could be no restraint of trade, because no competition is involved." [R. 86.]

Richfield did show, as stated by the District Court, that of the 1343 L. O. stations in existence as of December 31, 1950, Richfield had created 1092 of them, constituting 81.3 per cent. [Ex. W; R. 515, 1756.] The term "created by Richfield" was defined as referring to those stations built by Richfield or by the property owner under agreement with Richfield on sites which had never theretofore been used or equipped as a service station handling any petroleum products.

Richfield did not contend, as stated by the District Court, that "the mere creation of an exclusive form of outlet is, in itself, sufficient to avoid the consequence of the anti-trust laws." [R. 86.] Richfield's showing that in excess of 81 per cent of its stations were created by it is significant and relevant to the collateral issue regarding the L. O. stations (discussed in Part I-B of this Brief) that if the relationship between Richfield and the L. O. operators is not such as to be excluded from the Acts, nevertheless, Richfield's restriction on the L. O. operators is neither unreasonable under Section 1 of the Sherman Act, nor does it come within the qualifying clause of Section 3 of the Clayton Act.

B. If It Be Determined That the Relationship Between Richfield and the L. O. Operators Is Such That Richfield's Restrictions on Them Are Cognizable Under the Sherman and Clayton Acts, Nevertheless There Are No Facts Found by the District Court Upon Which It Could Properly Base Its Conclusion That the Restrictions Are Unreasonable Under the Sherman Act or That the Requirements of the Qualifying Clause of Section 3 of the Clayton Act Have Been Met.

SHERMAN ACT, SECTION 1.

It is axiomatic that not all restraints of trade are illegal, but only those determined to be unreasonable.[45] The tests of unreasonableness have been variously stated. The most recent pronouncement of a test in a Sherman Act case is in *United States v. Columbia Steel Co.*, 334 U. S. 495, 527, 528; 92 L. Ed. 1533, 1554 where the Court said:

> "In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer

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[45] *Standard Oil Co. v. United States*, 221 U. S. 1; 55 L. Ed. 619 (1911)
United States v. American Tobacco Co., 221 U. S. 106, 179; 55 L. Ed. 663, 693 (1911)
Board of Trade v. United States, 246 U. S. 231, 238; 62 L. Ed. 683, 687 (1918)
United States v. Columbia Steel Co., 334 U. S. 495; 92 L. Ed. 1533 (1948)
Appalachian Coals, Inc. v. United States, 288 U. S. 344, 360; 77 L. Ed. 825, 830 (1933).

demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. *The relative effect of percentage command of a market varies with the setting in which that factor is placed.*" (Emphasis supplied.)

In the same case the Court said also:

"Exclusive dealings for rolled steel between Consolidated and United States Steel, brought about by vertical integration or otherwise, are not illegal, *at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product.*" (Emphasis supplied.) (*Id.* at 524; *id.* at 1552.)

Other statements of the tests of unreasonableness are contained in *Board of Trade v. United States,* 246 U. S. 231, 238; 62 L. Ed. 683, 687 (1918),[46] and in *Appalachian*

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[46]The Court there said:

"But the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." (246 U. S. 231, 238; 62 L. Ed. 683, 687 (1918).)

Coals, Inc. v. United States, 288 U. S. 344, 361; 77 L. Ed. 825, 830 (1933).[47]

While the District Court determined that Richfield's restrictions upon L. O. operators were unreasonable restraints of trade under Section 1 of the Sherman Act [Conclusions of Law Nos. 2 and 7, R. 163-4], such a conclusion lacks foundation and is meaningless in the absence of findings supported by facts showing the unreasonableness.

The government did not offer evidence of any facts relative to any of the standards by which the unreasonableness of a restraint is to be measured. The government's proof consisted of a showing (1) that Richfield forbade the L. O. operators from handling or displaying competitive merchandise in Richfield's stations and equipment; (2) that Richfield enforced this limitation with the result that some of the L. O. operators, even if they desired on occasion to handle non-Richfield lube oil and grease and non-sponsored automotive accessories, did not do so; and (3) that certain salesmen of companies selling competitive lube oils and automotive accessories were unable to sell their products to those operators. The government showed for the years 1938 to 1950, inclusive, the numbers of L. O. stations and the volume of gasoline

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[47]The Court there said:

"The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendants' plan of making sales, the reasons which led to its adoption, and the probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal." (288 U. S. 344, 361; 77 L. Ed. 825, 830 (1933).)

sold therein and the dollar value thereof. [Ex. 26-A; R. 321-326, 336-341, 1540.]

The District Court based its determination of illegality under Section 1 of the Sherman Act on the above facts alone.

The proof of the existence of restraint is not proof that it is unreasonable unless the rule of reason is gone and exclusive dealing contracts are now held to be *illegal per se.*[48]

The District Court, in effect, considered the practices illegal *per se.* Despite the precept of the above cases that clearly relevant to the issue of reasonableness are the purpose and intent of the questioned acts and that the trial court shall inquire whether the action springs from business requirements or purpose to monopolize, the District Court's Opinion states:

> "And a specific intent, or good motive, for that matter, is not material when we deal with Section 1 of the Sherman Act or Section 3 of the Clayton Act." [R. 77.]

Despite the further precept of the cases that particularly relevant and to be investigated by the trial court are the economics of the industry involved and the competitive conditions therein, the District Court's Opinion states:

> "Other considerations, such as *economic necessity,* do not, and should not enter into our inquiry whether

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[48]Exclusive dealing contracts are not illegal *per se* under Section 1 of the Sherman Act.

United States v. Columbia Steel Co., 334 U. S. 495, 522-524; 92 L. Ed. 1533, 1551, 1552 (1948)

United States v. Bausch & Lomb Optical Co., 321 U. S. 707, 728, 729; 88 L. Ed. 1024, 1038, 1039 (1944).

the practices here involved violated either statute. . . . Economic considerations are relevant in determining legislative policy. They may be important in interpreting the limit of that policy. They do not constitute an excuse for the violation of the legislative policy declared in a statute." (Emphasis by Court.) [R. 77-8.]

We respectfully urge the Supreme Court to consider the state of the record in this case in the light of the various factors which this Court has held to be relevant to the problem of reasonableness and which are to be inquired into before the restraint may be determined to be unreasonable (unless, of course, as stated in *United States v. Columbia Steel Co.*, 334 U. S. 495, 522; 92 L. Ed. 1533, 1551, the restraint is either illegal *per se* or is accompanied with a specific intent to accomplish a forbidden restraint, neither of which exceptions is involved in the instant case):

(a) Whether Richfield's Purpose With Regard to the L. O. Stations Is the Restraint or Suppression of Competition or Whether Its Acts Spring From Business Requirements.[49]

The government offered no proof at all on this factor. Richfield's proof explained its need for its own outlets, *i. e.*, that the intense competition for the business of the

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[49] *United States v. Columbia Steel Co.*, 334 U. S. 495, 527, 528; 92 L. Ed. 1533, 1544 (1948)
United States v. Yellow Cab Co., 332 U. S. 218, 227; 91 L. Ed. 2010, 2018 (1947)
United States v. Yellow Cab Co., 338 U. S. 338; 94 L. Ed. 150 (1949)
United States v. Paramount Pictures, 334 U. S. 131, 174; 92 L. Ed. 1260, 1301 (1948)
Appalachian Coals, Inc. v. United States, 288 U. S. 344, 361; 77 L. Ed. 825, 830 (1933).

independent service station dealers resulted in Richfield's being unable to depend upon such dealers as the market for a sufficient volume of petroleum products. Richfield's proof also showed the factors which explained Richfield's increasing need for service station outlets following World War II. Chief among these were (1) Richfield's increase by 32½% of its refinery capacity for the manufacture of gasoline, which increase occurred during the war at the request of the government,[50] and (2) the sharp decrease in the government's purchases of gasoline from Richfield on the day following V-J Day in 1945, when purchases were cut down from 17,000 barrels per day to 2,000 to 3,000 barrels per day. (See Statement, pp. 12 and 13 hereinabove.)

Accordingly, it was demonstrated that Richfield's business purpose was to stay in the market as a competitor; it had no purpose to suppress competition or prevent its competitors from reaching the market by their own efforts.

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[50]Compare *United States v. Columbia Steel Co.*, 334 U. S. 495; 92 L. Ed. 1533 (1948) where the purpose of the acquisition of Consolidated Steel by United States Steel was the need by United States Steel of outlet for steel manufactured at the Geneva, Utah, plant purchased by United States Steel from Defense Plant Corporation with the approval and encouragement of the government.

Note particularly that in the *Columbia Steel* case the valid need for outlet justified the acquisition of a *competitor* and *customer* of United States Steel. The L. O. stations created and acquired by Richfield were neither its competitors nor its customers. See discussion, on page 94 above, of the "self-created" L. O. stations and, on pages 13 and 14 above, of the fact that the L. O. operators had not previously been independent dealers.

The District Court made no findings of such facts and denied Richfield's motion that it do so. [R. 193.] The District Court explained in its Opinion that such facts concerning intention are immaterial.

(b) Whether the Effect of the Practice Complained of Has Been to Unreasonably Restrict the Opportunities of Competitors to Market Their Products.[51]

The government offered no proof whatsoever on this score. True, the government's competitor witnesses said they could not sell or had difficulty in selling to the L. O. operators; but that fact needed no proof and could be inferred from Richfield's acknowledgment that it forbade the L. O. operators to buy from competitors. Such testimony, without more, does not prove or even tend to prove that the competitors' opportunities to market their products were unreasonably restricted. Such result could be proved by a showing, if the facts so warranted, that the business of competitors seriously declined, that there were but few or no other outlets for their products available to them, etc. But no effort at proof of such nature was suggested by the government.

The District Court made no finding that the opportunities of competitors to market their products had been unreasonably restricted; and had it done so, there are no facts in the record which could support the same.

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[51] *United States v. Columbia Steel Co.*, 334 U. S. 495, 524; 92 L. Ed. 1533, 1552 (1948).

(c) Whether Richfield Has the Position of Dominating Power in the Industry Affected.[52]

The government made no effort to prove this.

Richfield effectively proved that it had no dominating power. It showed its minority position in the industry. See the comparative statistics discussed in the Statement on pages 11 and 12 hereinabove. See also Exhibit M-7 [R. 441-8, 1560] which shows the relative positions of the various gasoline distributing companies in the Western Area based on volume of taxable motor fuel sales.

The District Court made no finding of such facts.[53]

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[52]*Standard Oil Co. (Indiana) v. United States,* 283 U. S. 163, 179; 75 L. Ed. 926, 951 (1931)

Standard Oil Company of California v. United States, 337 U. S. 293, 308; 93 L. Ed. 1371, 1383 (1949)

United Shoe Machinery Corp. v. United States, 258 U. S. 451, 457, 458; 66 L. Ed. 708, 717 (1922)

Federal Trade Commission v. Paramount Famous-Lasky Corp., 57 F. 2d 152, 155, 156 (C. C. A. 2, 1932).

[53]The attitude of the District Court to the statistical evidence [Exs. M-1 to M-13] is reflected by the Court's comments at the time it passed on the government's objections to the offer of such evidence. The District Court said:

> "I am merely letting them in so as to have them in the record. If you [counsel for Richfield] want to make an issue of that, I will strike them out so you have a good point." [R. 1558.]

> "So I do not want to intimate that I believe it is of any materiality, because that is the argument that Standard made. But I am allowing it into the record so it will be there." [R. 1558.]

(d) What the Competitive Conditions Are in the Industry and the Strength of Richfield's Competition.[54]

The government offered no proof concerning these matters.

Richfield proved that the industry is intensely competitive [R. 1580]; that there are 68 companies selling gasoline to service station dealers in the western area each of which sells in excess of one million taxable gallons of gasoline per year and that the number has remained fairly constant for a period of twelve years [Ex. M-8; R. 449-53, 1560]; that there are 121 companies marketing to service station dealers in the Western Area their own brands of lubricating oil and that the number has increased sharply since 1946. [Ex. M-9; R. 454-57, 1560.]

The District Court made no finding on these matters.

(e) Whether the Public Interest Has Been Harmed or Adversely Affected.[55]

No proof of anything pertinent to this subject matter was offered by the government; nor are there findings concerning the same.

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[54] *United States v. Columbia Steel Co.*, 334 U. S. 495; 92 L. Ed. 1533 (1948)
Board of Trade v. United States, 246 U. S. 231, 238; 62 L. Ed. 683, 687 (1918)
Appalachian Coals, Inc. v. United States, 288 U. S. 344, 360; 77 L. Ed. 825, 830 (1933)
Standard Oil Co. (Indiana) v. United States, 283 U. S. 163; 75 L. Ed. 926 (1931).

[55] *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 499, 500; 84 L. Ed. 1311, 1326, 1327 (1940)
Wilder Manufacturing Co. v. Corn Products Refining Co., 236 U. S. 165; 59 L. Ed. 520 (1915)
United States v. American Tobacco Company, 221 U. S. 106, 179; 55 L. Ed. 663, 693 (1911)
Nash v. United States, 229 U. S. 373, 376; 57 L. Ed. 1232, 1235 (1913).

Accordingly the District Court decision that the restriction on the L. O. operators was an unreasonable restraint of trade is not supported by anything in the record and is clearly erroneous.

CLAYTON ACT, SECTION 3.

Whether Richfield's restrictions on the L. O. operators violate Section 3 of the Clayton Act depends upon whether there is a showing of facts sufficient to meet the requirements of the qualifying clause thereof, to wit,

> ". . . where the effect of such lease, sale, or contract for sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." (15 U. S. C. A. Sec. 14.)

It is true that *Standard Oil Company of California v. United States*, 337 U. S. 293, 313, 314; 93 L. Ed. 1371, 1385, 1386 held that the Clayton Act did not require an economic investigation "of the same broad scope as was adumbrated with reference to unreasonable restraints of trade" and that "the qualifying clause of §3 is satisfied by proof that competition has been foreclosed in a substantial *share* of the line of commerce affected."[56]

The *Standard* case did not hold that exclusive dealing contracts are *illegal per se*, nor that the qualifying clause

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[56]The Court said:

> "We conclude, therefore, that the qualifying clause of §3 is satisfied by proof that competition has been foreclosed in a substantial *share* of the line of commerce affected. It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, and it is clear that the affected *proportion* of retail sales of petroleum products is substantial." (Emphasis supplied.) (337 U. S. at 314; 93 L. Ed. at 1386.)

may be ignored for all purposes. Notwithstanding the circumscribed effect given the qualifying clause, nevertheless under the Standard rule there still remains the essential element of "proof" of substantiality, *i. e.*, facts sufficient to support a finding that the *"share"* or affected *"proportion"* of the line of commerce is "substantial." The words "share" and "proportion" denote the quality of comparativeness, not of absolutism. What may be substantial on a comparative basis in a given set of facts may be considered wholly unsubstantial in a different setting.

In the *Standard* [illegible]*e*, substantiality was found to exist in the light of the following facts:

(1) Standard, while it did not of itself dominate the market, was nevertheless the largest seller in the field, and its combined sales amounted to 23% of the total taxable gallonage;

(2) The independent service stations covered by the exclusive dealing contracts there held illegal, sold 6.7% of the total sales; and sales by company-owned service stations constituted 6.8% of the total sales;

(3) The number of service stations, contracts with which were held illegal, was 5,937, which constituted 16% of the retail gasoline outlets in the western area. These stations purchased in one year approximately $57,000,000 worth of gasoline and approximately $8,000,000 worth of other products.

(4) While the length of time Standard operated as a competitor in the western area does not appear, mention is made in the decision that *before 1934,* Standard's

sales of petroleum products to independent service stations were made pursuant to agency agreements.

In the *Richfield* case, the District Court concluded that the number of outlets and volume of business covered by all of the stations (L. O., 337 and 3-C) in the aggregate, "is substantial whether considered comparatively or not." [Conclusion of Law No. 10; R. 165.] While the findings of fact cover the numbers of stations and volume of business done by Richfield [Finding Nos. 30 to 37; R. 154-7], the District Court made no findings by which such numbers could be considered *comparatively* with relevant industry totals; and the District Court denied Richfield's motion that it make such findings. [R. 193.]

We respectfully submit that the District Court's determination of substantiality cannot be supported in view of the following undisputed facts:

(1) Unlike Standard, Richfield is not the largest seller of gasoline in the Western area. It was sixth in volume of sales in 1949 and 1950 and seventh in 1947 and 1948. Richfield's combined sales in 1950 amounted to 7.3% of the total taxable gallonage. [Ex. M-7; R. 441-8, 1560.]

(2) The volume of gasoline sold at L. O. stations in 1950 was 3.18% of the total taxable sales of motor fuel by all companies and was 4.9% of the volume of gasoline sold by all companies to all stations. [Ex. M-5; R. 437-40, 1559.]

The volume of gasoline sold at the L. O. stations was 2.71% of the total volume of gasoline manufactured and

available for sale in the Western area in 1950. [Ex. Z; R. 517, 1768.]

(3) The number of Richfield L. O. stations was 1,343 as of December 30, 1950. To these stations Richfield sold in 1950 $23,790,968.00 worth of gasoline. [Ex. 26-A; R. 338, 1540.]

In 1948 Richfield's L. O. stations constituted 3.28% of all retail gasoline outlets in the Western area. [Ex. M-4; R. 436, 1557.]

(4) Richfield is a relative newcomer in the Western area, it having commenced to do business on March 12, 1937. [Finding 5, R. 135.]

We respectfully submit further that when consideration is given to the fact that in excess of 81% of the L. O. stations were originally created by Richfield because of Richfield's need for outlets in order to remain as a competitive factor in the industry and that when consideration is given to Richfield's status as a relative newcomer in its marketing area, it can hardly be said fairly that there is proof "that competition has been foreclosed [by Richfield] in a substantial share of the commerce affected." Even without conducting the economic investigation applicable in a Sherman Act proceeding and by limiting the issue to the test for Clayton Act purposes enunciated by the *Standard* case, the facts in the Richfield situation, as disclosed by the record, prove that the share or proportion of the line of commerce affected, while not insignificant, is nevertheless not substantial.

C. If It Be Determined That Richfield's Restrictions on the L. O. Operators Do Violate Either Section 1 of the Sherman Act or Section 3 of the Clayton Act, the Judgment of the District Court Must Nevertheless Be Reversed Because the Injunctive Provisions Relating to the L. O. Stations Are Erroneous and Unduly Onerous in Three Respects.[57]

FIRST: Paragraph VI of the Judgment enjoins Richfield from exercising, for any reason, the 24-hour termination clause contained in any L. O. lease, and enjoins Richfield from cancelling any L. O. lease on less than thirty days' written notice.

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[57] Paragraph VI of the Judgment provides as follows:

"Richfield, its successors or assigns, its officers, directors, agents, representatives, and all persons and corporations acting or claiming to act on its behalf, are hereby perpetually enjoined from exercising the 24-hour termination clause contained in any lease which it now has with or which is in effect between itself and any independent dealer operating a retail outlet under an L-O type of arrangement with defendant, and is perpetually enjoined from cancelling any lease which it now has with or which may be in effect between itself and any independent dealer operating a retail service station under the L-O type of arrangement on less than 30-days' written notice to any such dealer. Such 30-day cancellation privilege may be exercised by defendant only for a breach of any of the written covenants contained in any written lease entered into between Richfield and an independent dealer operating a retail outlet under the L-O type of arrangement and by written notice sent by registered mail to such dealer advising him of such alleged breach and notice of cancellation therefor. A copy of any such written notice of cancellation shall be sent by registered mail to the Attorney General of the United States or to his duly authorized representative designated by the Attorney General in writing to Richfield at the time said written notice of cancellation is sent to such dealer by defendant." [R. 168.]

The District Court's Opinion[58] explains that this portion of the Judgment is based upon the Court's view that the lease creates a month to month tenancy; that under state and federal law,[59] it may not be terminated by either party except on at least one month's (30 days) prior notice; and that the 24-hour termination clause is against public policy.[60]

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[58]The Opinion states:

"And I am inclined to think that, because of the conflict of the 24-hours' termination clause with the monthly rental provisions, Courts would consider the tenancy created by the L-O agreements, *at least*, a month-to-month tenancy *terminable only* upon the minimum notice required in such cases." (Emphasis by Court.) [R. 83.]

The Opinion states further:

"The 24-hours' termination clause is invalid, against public policy, and cannot, either under state or federal law, be enforced as a means of terminating the lease for even legal grounds by any notice by either side less than at least the minimum rental period for which rent is reserved, one month." [R. 94.]

[59]We are unaware of what "federal law" could be applicable to this phase of the problem, particularly in view of the doctrine of *Erie R. Co. v. Tompkins*, 304 U. S. 64; 82 L. Ed. 1188 (1938).

The two federal cases cited in footnotes 24 and 25 to the Opinion do not apply "federal law" but refer to the applicable tenancy laws of California and North Dakota, respectively.

[60]In *Devonshire v. Langstaff*, 10 Cal. App. 2d 369, 372, 51 P. 2d 902, 904 (1935), the Court said:

". . . There is nothing stipulated in the lease that is beyond the power of the parties. There is nothing in the contractual provision for the termination of the lease *that violates any rule of public policy*, and *that parties may, in their lease, provide for the termination thereof upon notice different*

We respectfully submit that this portion of the decree is erroneous, because (a) it is based upon an assumption of the legal incidents of a landlord-tenant relationship under state law, which has no relevance in the formulation of a decree designed to enjoin anti-trust violations; and (b) its premise is fallacious, the state law having been incorrectly interpreted.

The District Court's determination that Richfield's L. O. lease form created a month to month tenancy was predicated on an assumed conflict in the lease between the twenty-four hour termination clause and the monthly rental provisions. There is no conflict. The District Court overlooked the provisions in each lease: "Rent for any fractional part of a month shall be duly prorated on the basis of the rent for said month as herein specified." [Exs. 1, 1-A, 1-B, 1-D, 1-E and 1-G; R. 239-40, 241-2, 243-4, 246-7, 248-9, 251-2, 567.] Furthermore, if there were a conflict, the twenty-four hour termination clause would prevail over the presumption that a lease for an indefi-

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from and superseding that prescribed by the code is well established. (*Conner v. Jones*, 28 Cal. 59, 60; *Watkins v. McCartney*, 57 Cal. App. 643 (207 Pac. 909); *Buhman v. Nickels & Brown Bros.*, 1 Cal. App. 266 (82 Pac. 85); *Jameson v. Chanslor-Canfield Midway Oil Co.*, 176 Cal. 1 (167 Pac. 369); *Wisner v. Richards*, 62 Wash. 429 (113 Pac. 1090, Ann. Cas. 1912D, 160); sec. 1946, Civ. Code.)

"If, therefore, the parties could by agreement, waive compliance with the sections of the Civil Code prescribing notice, then we need not concern ourselves with the requirements of the various code sections dealing with notice of termination of lease." (Emphasis supplied.)

nite term is a month to month tenancy if the rent is payable monthly.[61]

Assuming, however, that the District Court's determination was correct that the lease does create a month to month tenancy, its decision that such a tenancy cannot be terminated except on at least thirty days' notice is erroneous. The decision ignores the statutes of the six Western States in which the lease form is used, the majority of which provides for termination by notice shorter than thirty days.[62]

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[61] *In the absence of express agreement,* the reservation and payment of rent at stated periods is the principal criterion to determine whether a lease for an indefinite period is for a term from year to year, month to month, week to week or day to day.

The parties to a lease may, by express agreement, fix termination privileges in the various types of tenancies at will differing from periods fixed for the payment of rent.

Camp v. Matich, 87 Cal. App. 2d 660, 665-666, 197 P. 2d 345, 349 (1948)
Devonshire v. Langstaff, 10 Cal. App. 2d 369, 372, 51 P. 2d 902, 904 (1935)
Hull v. Laugharn, 3 Cal. App. 2d 310, 314, 39 P. 2d 478, 480 (1934)
Wolfer v. Hurst, 47 Ore. 156, 161, 82 Pac. 20 (1905)
Say v. Stoddard, 27 Ohio State 478 (1875)
Jones, Landlord and Tenant, Sec. 215, p. 253 (1906)

[62] CALIFORNIA: 30 days in the absence of agreement; but provision permitting agreement for termination on seven days' notice. *Cal. Civ. Code,* Sec. 1946.

WASHINGTON: 20 days for unlawful detainer. *Remington Revised Statutes of Washington,* Sec. 812.
30 days for termination. *Remington Revised Statutes of Washington,* Sec. 10619.
Union Oil Co. v. Walker, 150 Wash. 151, 272 Pac. 64 (1928), holds 20-days notice sufficient.

OREGON: 30 days *"except as otherwise provided by statute or agreement." Oregon Compiled Laws Annotated,* Sec. 8-307.

ARIZONA: 10 days. *Arizona Code Annotated,* Sec. 71-304.

NEVADA: 15 days. *Nevada Compiled Laws,* Sec. 9135.

IDAHO: One month. *Idaho Code Annotated,* Sec. 55-208.

SECOND: Paragraph VI of the Judgment enjoins Richfield from exercising the "30-day cancellation privilege" (created by the District Court) excepting "only for a breach of any of the written covenants contained in any written lease" with an L. O. operator.[63]

We submit that this decree is both punitive and confiscatory. Although the lease expressly gives both Richfield and the L. O. operator the right of termination at any time with or without cause, Richfield is enjoined from using it except for breach of the written covenants. The District Court first decided that the "form" of the transaction chosen by Richfield, *i. e.*, the lease, was the factor that compelled its determination of illegality; and the Court then enjoined Richfield from changing the form in so far as the existing 1343 L. O. leases are concerned. If the Supreme Court should affirm the determination of illegality on the ground stated in the District Court's Opinion, *i. e.*, that L. O. operators are not employees or agents "in truth and fact" [R. 89] and if this injunction becomes effective, Richfield cannot terminate any of the 1343 leases to install in any L. O. station either a salaried employee or "true" agent.

Observe that the operative written covenants of the lease are limited largely to maintaining the premises in good repair and condition and to paying the rent. The

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[63]State laws permit the lessor to terminate a month to month tenancy by notice whether or not there is a breach by the tenant (See statutes cited in Note 62.) The Judgment deprives Richfield of this right in all six States.

lease does not contain provisions concerning the many requirements relating to the manner of operation of the station of which the operator is informed before he is installed, only one of which is the basis of this litigation. Consider that the rent payable is substantially (33⅓%) less than the fair rental value of the property. Recall that since there is no stated expiration date, the lease will continue until terminated by one of the parties. Under these circumstances, it is to be anticipated that the L. O. operator will take care not to breach the written covenants of his lease and will thus retain his sinecure for life regardless of devoting the station entirely to non-Richfield gasoline or oils.

As to the 510 fee-owned L. O. stations [Ex. W; R. 515, 1756], Richfield is enjoined for the lives of the respective operators from obtaining their fair rental value. As to the remaining 833 L. O. stations leased by Richfield from property owners, Richfield is required for the duration of the existing underlying leases to absorb as a penalty the difference between the rents payable thereunder and the lesser rents receivable by it from L. O. operators. For the year 1950, the amount of such difference was $485,536.54. [Ex. AA, R. 518, 1778.]

The prospect of an annual "fine" in such amount reveals in harsh outlines the effect of the District Court's decree in a civil action. That the amount is not payable by Richfield to the government but instead is largesse bestowed by the Court on the L. O. operators does not prevent its being, in essence, a fine in an extraordinary large amount.

We recognize that the courts have broad powers in framing their decrees in equity actions to effectuate the purposes of the anti-trust laws. But in civil proceedings the decree should be remedial and not punitive.[64]

Even in those flagrant cases of violation where the remedy of divestiture was held justified, the decrees requiring the disposition of properties unlawfully held permit the defendant an ample time to secure the market value thereof.[65]

Here, as to properties not unlawfully held, Richfield is required in effect to dedicate them (to the extent of the loss of rental value) to the existing L. O. operators. A somewhat comparable result was condemned in *Hartford-*

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[64]In *United States v. National Lead Co.*, 332 U. S. 319, 338; 91 L. Ed. 2077, 2094 (1947), the Court said:

> "This is a civil, not a criminal, proceeding. The purpose of the decree, therefore, is effective and fair enforcement, not punishment."

In *Hartford-Empire Co. v. United States*, 323 U. S. 386, 409; 89 L. Ed. 322, 359 (1945), the Court said:

> "The Sherman Act provides criminal penalties for its violation, and authorizes the recovery of a penal sum in addition to damages in a civil suit by one injured by violation. It also authorizes an injunction to prevent continuing violations by those acting contrary to its proscriptions. The present suit is in the last named category and we may not impose penalties in the guise of preventing future violations."

[65]*Hartford-Empire Co. v. United States*, 323 U. S. 386, 426; 89 L. Ed. 322, 368 (1945).

United States v. Aluminum Co. of America, 91 Fed. Supp. 333, 419 (D. C. N. Y., 1950).

Empire Co. v. United States, 323 U. S. 386, 414; 89 L. Ed. 322, 362 (1945).[66]

THIRD: The District Court denied Richfield's motion [R. 193] to include in its decree a provision comparable to that included in the decree formulated by the same District Judge in *United States v. Standard Oil Co.,* 78 Fed. Supp. 850 (D. C. Cal., 1948), the case which he deemed determinative of this litigation.[67]

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[66]Here the Supreme Court said:

"Since the provisions of paragraphs 21 to 24 inclusive, in effect confiscate considerable portions of the appellants' property, we think they go beyond what is required to dissolve the combination and prevent future combinations of like character.

* * * * * * * *

"It is suggested that there is not confiscation since Hartford might, with the later consent of the court, sell its patents. Under the decree as entered below nothing can be obtained by Hartford for the use of its patents and we cannot speculate as to what might be the ultimate adjustments made by the trial court in the decree.

"If, as suggested, some of Hartford's patents were improperly obtained, or if some of them were awarded a priority to which the invention was not entitled, avenues are open to the Government to raise these questions and to have the patents canceled. But if, as we must assume on this record, a defendant owns valid patents, it is difficult to say that, however much in the past such defendant has abused the rights thereby conferred, it must now dedicate them to the public." (323 U. S. at 414; 89 L. Ed. at 362.)

[67]The decree in the *Standard Oil* case contained the following provision:

"IX.

"Nothing contained in this judgment shall enjoin or restrain either defendant from selling or contracting to sell petroleum products and/or automotive accessories including such products as are sponsored by defendants, to independent dealers on the condition that any pump or tank or other container or receptacle for such products, furnished by defendant and marked as such to an independent dealer, shall be used solely for the

Richfield's motion was made on the ground that the omission in the Richfield decree of a similar qualification concerning the operators' use of Richfield's pumps, tanks or other containers serves to enjoin Richfield from engaging in important competitive marketing practices which Richfield's largest competitor, Standard Oil Company of California, is expressly permitted to engage in by the judgment in the *Standard* case. Standard is given the right to require exclusive dealing in Standard's products in equipment owned by Standard and located in stations including those owned or controlled by independent dealers having all of the attributes of the 337 and 3-C dealers in this case. Antithetically, Richfield is denied the right to control the products sold through its equipment in Richfield's own stations.[68]

The Supreme Court has recognized the wisdom of formulating anti-trust decrees in such fashion to preserve the competitive abilities of component members of an industry. *Ford Motor Co. v. United States,* 335 U. S. 303; 93 L. Ed. 24 (1948.)

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storing, handling or dispensing of defendant's petroleum products and to prescribe by agreement or regulations not inconsistent with the provisions of this decree, for the storage, handling, or dispensing of such products." [Tr. of Record on Appeal to the Supreme Court, No. 279, October Term, 1948, p. 192.]

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[68]At the hearing on Richfield's objections to the Findings and Judgment proposed by the government (in which objections the same amendment to the Judgment was requested), the government asserted that the reason for the inclusion of paragraph IX in the Standard decree was that Standard had loaned receptacles for petroleum products to various dealers, which receptacles bore Standard's name and a description of the product. [R. 1995.] Although Richfield in turn called attention to the fact that the same factor was present in each L. O. station [R. 2004], the District Court denied Richfield's motion. [R. 192-3.]

II.

THE DEALER STATIONS.

A. The Government Failed to Prove Either of the Essential Elements of Its Charges of a Restraint Concerning the Dealer Stations, i. e., (1) That There Are Oral Exclusive Dealing Contracts Between Richfield and the Dealers [Compl. pars. 17-19; R. 6-7] and (2) That Richfield Required the Dealers to Adhere to Such Oral Agreements by Coercive Methods [Compl. par. 20; R. 7-8]. The District Court's Findings of Fact Relating to the Above Charges as Well as Its Findings Concerning the Effect on the Dealers and on Competitors Are "Clearly Erroneous" Under Rule 52(a), F. R. C. P.

The written sales contracts used with the 337 and 3-C dealers are not requirements or exclusive dealing contracts. The contracts contain an obligation on the dealer to buy a specified minimum quantity and give him the right to buy additional quantities subject to a specified maximum.[69] A contract of such nature leaves the purchaser freedom to buy additional quantities of the same products from any and all competitors of the seller.[70] Ac-

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[69]The "minimum" quantity which the dealer obligates himself to buy is substantially less than his anticipated future requirements based upon his past experience. (See facts discussed in the Statement on pp. 20 to 22, and pp. 31 to 33, hereinabove.)

[70]This result was recognized in *Standard Oil Company of California v. United States*, 337 U. S. 293, 303, 304; 93 L. Ed. 1371, 1380, 1381. In discussing *Federal Trade Commission v. Sinclair Refining Company*, 261 U. S. 463; 67 L. Ed. 746, the Court said:

> "The Sinclair case involved the lease of gasoline pumps and storage tanks on condition that the dealer would use them only for Sinclair's gasoline, but Sinclair did not own patents on the pumps or tanks and evidently did not otherwise control

cordingly, such a contract does not come within the description in Section 3 of the Clayton Act of the type of contracts there dealt with. Nor can it be a restraint of trade under Section 1 of the Sherman Act.

Evidently recognizing such result, the government's complaint charged, as the basis of illegality, that (1) Richfield had made supplemental *oral* contracts, agreements and understandings with *each* of the 337 and 3-C dealers by which they agreed to handle only Richfield petroleum products and approved automotive accessories [Compl. pars. 17-19; R. 6-7]; and (2) Richfield had required such dealers to adhere to such oral agreements and understandings by certain alleged *coercive* methods: (a) by threats of cancellation of the written sales contracts and leases unless the alleged oral agreements were made and adhered to; (b) by inspection, policing and supervision of the

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their supply. Although the Trade Commission had found that few dealers needed more than one pump, the Court concluded that 'the record does not show that the probable effect of the practice will be unduly to lessen competition.' 261 U. S. at 475, 67 L. Ed. 753, 43 S. Ct. 450. The basis of this conclusion was thus summarized:

" 'Many competitors seek to sell excellent brands of gasoline and no one of them is essential to the retail business. The lessee is free to buy wherever he chooses; he may freely accept and use as many pumps as he wishes, and may discontinue any or all of them. He may carry on business as his judgment dictates and his means permit, save only that he cannot use the lessor's equipment for dispensing another's brand. By investing a comparatively small sum, he can buy an outfit and use it without hindrance. He can have respondent's gasoline, with the pump or without the pump, and many competitors seek to supply his need.' *Id.* 261 U. S. at 474, 67 L. Ed. 753, 43 S. Ct. 450.

"The present case differs of course, in the fact that a dealer who has entered into a requirements contract with Standard cannot consistently with that contract sell the petroleum products of a competitor of Standard's no matter how many pumps he has. . . ." (337 U. S. at 303; 93 L. Ed. at 1380.)

sales of the 337 and 3-C dealers "to make certain that no petroleum products or automotive accessories *except those* designated" by Richfield are sold, stored or handled by such dealers; and (c) by actual cancellation "in instances too numerous to be herein mentioned" of the written leases or sales agreements of dealers who refused to conform to the alleged oral agreements [Compl. par. 20; R. 7-8]. The complaint further charged that the contracts, written and oral, and Richfield's acts had the effect of preventing and eliminating the competition of Richfield's competitors for the trade of the dealer stations, and had the effect of depriving the dealer of the opportunity of buying petroleum products and automotive accessories from Richfield's competitors [Compl. par. 21; R. 8-9].

The government's proof fell far short of establishing any of such charges. It did not show any oral contract, agreement or understanding of exclusive dealing with *any* of the existing 1361 dealers of the 337 type or with *any* of the existing 261 dealers of the 3-C type; and the government showed only one instance, which occurred in 1941, which could be construed as an oral understanding of exclusive dealing with any former 337 or 3-C dealer. It did not show any pattern of coercive tactics on Richfield's part, as charged, or indeed any act or acts in the entire fourteen-year period of Richfield's existence which could be considered "coercive." The government did not show that all dealers or, in fact, any dealer handled exclusively either Richfield oil or grease or approved automotive accessories, or that Richfield's competitors, or any of them, were unable to sell their products to any of such dealers. The government did show that the 337 and 3-C dealers handled no competitor's gasoline during the time they handled Richfield's gasoline; but it

was also shown that in many instances a dealer discontinued entirely buying Richfield's gasoline and changed to another supplier prior to the expiration of his contract with Richfield. The government did not show that the practice of any dealer (except McRae in 1941) in thus confining himself to the gasoline of one supplier at a time resulted from any oral agreement or understanding to that effect or from any coercive act or acts by Richfield, or from anything other than the volition of the dealer.

While the District Court made findings of fact adverse to Richfield on all of the charges alleged in the complaint (excepting that of threats of cancellation of contracts), the government's case was so meager in its proof of most of the charges and so completely devoid of proof of the others that, at the very least, it may be said that there is no substantial evidence to support any of the findings. When the entire record, including the proof presented by Richfield, is considered, there can be little doubt that each of the findings is clearly erroneous under Rule 52(a), F. R. C. P.

The test of the validity of findings under Rule 52(a) is as follows:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."
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> *United States v. U. S. Gypsum Co.*, 333 U. S. 364, 395; 92 L. Ed. 746, 766 (1948).

The paucity of the government's proof pertaining to the dealers is revealed by the number and type of witnesses called by it. Although the record is long, the overwhelming bulk of the testimony pertains not to the dealer stations but to the L. O. stations. While the government

called as witnesses twenty-four L. O. operators to prove Richfield's control over them, a matter admitted in Richfield's pleadings, the government's proof pertaining to the 337 dealer stations was confined to the testimony of two dealers, even though Richfield had denied all of the government's charges concerning them. One of the two, McRae, had not been a dealer more recently than five years prior to the trial; and the incident to which he testified occurred in 1941, ten years prior to the trial. The other witness, Moore, had been a 3-C dealer from 1945 to 1951, at which time he signed a 337 deal; and his testimony does not support the government's charges. As to the 3-C stations, the government called four dealers; the same Moore and Colmery, Strable and Ogburn. Of these four witnesses, only Ogburn testified to any incident even remotely supporting the government's charges which occurred subsequent to the conversion of the 3-C contract from an "entire requirements" to a specific quantity basis.

Although the government called twenty-five witnesses who were salesmen for competitors selling lubricating oil and automotive accessories, twenty-two of them testified only concerning efforts to sell their products to L. O. operators and gave no testimony concerning efforts to sell to 337 or 3-C dealers. None of the other three witnesses (Ellis, Turner and Cleveland) testified to inability to sell their products to any 337 dealer. Of the three, Ellis alone testified of inability to sell to a 3-C dealer; and such inability occurred prior to the time that such dealer's contract was changed from the entire requirements basis.

The government called four former employees of Richfield in subordinate capacities (Nicholson, Cowan, Bradford and Scollard) who testified to matters pertaining to both the L. O. and dealer stations. The testimony of

Nicholson was limited to Seattle, Washington, prior to 1941, and to the State of Arizona from 1941 to 1946, and that of Cowan to activities in the City of Prescott, Arizona. The testimony of Scollard and Bradford to any matters subsequent to 1937 was confined to the City of Portland, Oregon. With the sole exception of Cowan, none of such witnesses testified to any matters more recent than 1946, five years prior to the trial. Cowan's connection with Richfield as a commission agent ended in 1948. The government also called as its witness, under Rule 43(b), W. G. King, Jr., Richfield's Vice President in charge of marketing, but his testimony refuted and did not support the government's charges.

The government also called two former bulk plant agents, Duarte and Jones, and three former TBA distributors, Gates, Pitts and Redding. Of these five witnesses, only Duarte gave testimony which supported the government's charges in any respect, and his testimony was limited to matters occurring in his area, San Lorenzo, California, during the period ending in October, 1945, over five years before the trial.

In considering whether the testimony of the government's witnesses can support an inference of a general pattern and policy on Richfield's part either to enter into or require oral exclusive dealing contracts, agreements or understandings with its dealers generally, or to coerce them into exclusive dealing in the manner alleged, attention should be given (as did the trial courts in *United States v. General Electric Co.*, 82 Fed. Supp. 753 (D. C. N.

J., 1949)[71] and *United States v. J. I. Case Co.*, 101 Fed. Supp. 856 (D. C. Minn., 1951)[72]), to the number of instances testified to when compared to the total number of dealerships and to the period of time involved. Similarly, attention should be given to the limited areas to which the government's testimony was confined as compared to the broad areas involved in Richfield's operations.

At the trial Richfield attempted to show by examination of James E. Daley, special agent of the FBI, how many

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[71]In *United States v. General Electric Co.* the Court said:

". . . the Government's offer is not impressive. A number of years are here involved. Chiefly S agencies are accused. There were many thousands of them and at best but relatively few accusations are made." (82 Fed. Supp. at p. 821.)

". . . on the merits of the charges, after giving cognizance to the Government's argument that isolated instances should be sufficient to characterize an entire system of dealing in matters of this kind, substantial weight cannot be accorded these charges. . . . At most the Government has shown that on the lower echelons of the organization the rules were sometimes regarded as onerous and susceptible of causing loss of business, but the Government's documents are replete with evidence that in the higher and supervisory brackets all reasonable care was taken that the agency form should be strictly adhered to. . . . Considering the scope of the operation few instances were brought to light." (82 Fed. Supp. at p. 824.)

[72]*United States v. J. I. Case Co.* was similarly a suit under Sherman Act Section 1 and Clayton Act Section 3 asserting that Case had made oral exclusive dealing agreements and had coerced dealers to exclusive dealing by tactics including refusal to enter into written contracts or to renew existing ones unless the dealer agreed to become an exclusive Case dealer. In holding that the government had failed in its burden of proof the District Court said:

"The untenability of plaintiff's position is that, while it has established some flagrant attempts to coerce and put pressure on a few dealers to give up competing lines as a condition for

of the present and former 337 and 3-C dealers had been interviewed by the government in preparation of its case, in order that a comparison (similar to that made in *United States v. J. I. Case Co., supra*) could be made; but the District Court refused to permit any inquiry into this subject matter. [R. 1771-3.]

The various findings attacked in the Assignments of Error are discussed in the following groups.

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obtaining a Case contract or to obtain a renewal of the Case contract, it seeks to deduce from such instances that every exclusive Case dealer constitutes evidence of a so-called pattern or policy on the part of Case to obtain an agreement or understanding from its dealers that they will not handle competitive lines." (101 Fed. Supp. 856, 864-5.)

The Court commented on the number of dealers' reports and interviews of dealers and former dealers which the government had investigated prior to trial, from which it selected the 108 dealers as to whom testimony was given. In this case the Court said:

"But the instances of apparent competitive restraint pertain to a relatively small number of dealers." (101 Fed. Supp. 856, 864.)

"Not only does the testimony regarding the 108 dealers fail to sustain the inferences which plaintiff seeks to draw, but it seems significant that, of the 108 instances, only 26 occurred after January 15, 1946, when normal conditions after the war began to be resumed in the farm machinery industry. Plaintiff's evidence discloses that there were 16 instances in the year 1946, 10 in 1947, and none in 1948. Moreover, there were only seven dealers out of the 3,738 Case dealers in the United States who were called to testify that any attempt had been made to convince them that they should drop competing lines during the years 1946 and 1947. And of these 3,738 dealers, some 2,600 were handling competing lines, either long or short. And in this connection, it should be remembered that the Government circulated all of these dealers by questionnaires as to Case's competitive restriction policy during the years in question. These circumstances tend to negative plaintiff's contention that Case is pursuing a pattern or policy of imposing competitive restrictions on its dealers." (101 Fed. Supp. 856, 865.)

1. Findings re Oral Agreements.[73]

The District Court not only found the existence of oral agreements as alleged in the Complaint, but in Finding 33 found the existence of an oral agreement with *each* of the 1361 dealers of the 337 type and with *each* of the 261 dealers of the 3-C type.

Certainly the findings of oral agreements or understandings of exclusive dealing with the 337 and 3-C dealers cannot be supported by the testimony of the dealer witnesses as to their negotiations with Richfield representatives. Only one instance of such nature, occurring in the fourteen years of Richfield's existence, was testified to by a person who had been a 337 dealer not more recently than 1946; and that instance occurred in December of 1941.[74] No instance of an oral exclusive dealing agreement or understanding was testified to by any 3-C dealer.[75] Nor do the findings receive any better support

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[73]The Findings re the existence of oral agreements are enumerated in Assignment of Error II(1)(a). [R. 205-6.]

[74]McRae was originally an L. O. operator in one of Richfield's stations from 1939 to 1941, the period Richfield held the master lease on the property. [R. 1224.] McRae obtained the master lease on the same station from the property owner and on December 2, 1941, signed a 337 sales contract and painting agreement with Richfield relating to such station. [R. 1224.]

McRae asked Richfield to paint the station and stated he would be willing to handle Richfield's products but that he wanted the station painted. [R. 1235.] The Richfield representatives told him that if he handled Richfield's products they would arrange to paint the station. [R. 1225.]

[75]Ogburn, who operated a 3-C station under an oral arrangement between him and one Mathis, the 3-C dealer, did testify that a Richfield representative was present when Ogburn made his oral deal with Mathis and said it was Richfield's policy not to have other oils "if possible" and that Ogburn and Mathis "agreed" to keep competitive oils out of sight. [R. 1357.] Nothing was said that Ogburn could not have competitive oils. [R. 1367.]

from the testimony of Richfield's former employees, agents or distributors as to their negotiations with the 337 and 3-C dealers. None of them testified to any instance of any conversation with any dealer which could form the basis of an oral exclusive dealing contract, agreement or understanding.[76]

W. G. King, Jr., Richfield's Vice President, testified unequivocally that there were no oral agreements and that excepting for the 3-C deals during the period from 1945 to August, 1948, no contract was made on an exclusive or entire requirements basis. (See Statement at page 24 and page 33 hereof.)

2. Findings re Inspection, Policing and Supervision.

Finding 29 [R. 154] is as follows:

> "29. Richfield inspects, polices, and supervises the activities and sales of the independent operator at the 2965 service stations to make certain that no petroleum products or automotive accessories except those designated by defendant were or are sold, featured, or handled by the independent operator at the service station operated by him."

Note that the finding is made to apply indiscriminately to both the L. O. stations and the dealer stations. If

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[76]The only possible exception is the testimony of branch manager Bradford to a discussion with 337 dealer Kawalski which occurred in Portland, Oregon prior to 1946.

Bradford testified:

> "Q. Did you tell him to get rid of the motor oil? A. Well, you don't tell those fellows to get rid of anything. You have to sell them.
>
> Q. Did you tell them that it had anything to do with his ability to get a paint job? A. I told him, yes, if he would program a little better on oils and batteries and TBA, we had no trouble, of course, with gasoline, why, I would go all out on the paint job." [R. 1060.]

limited to the L. O. stations, the finding would be true excepting, of course, its characterization of the L. O. operators as "independent." In so far as the finding pertains to the dealer stations (337 or 3-C), it is clearly erroneous and without any evidentiary support.

The testimony of the government's witnesses falls far short of a showing of any acts of inspection, policing or supervision which could be considered of a coercive nature as distinguished from proper sales efforts, and certainly far short of a showing of any pattern of coercion. The inadequacy of the government's proof to support the finding is apparent when examination is made of the testimony of all of the government's witnesses: dealers,[11]

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[11] *McRae* (337 and L. O.) testified to inspection and control, not as to his 337 station but only as to the Richfield L. O. station of which he was the L. O. operator. [R. 1236.]

Moore (3-C and 337) testified to requests by a Richfield representative to take down competitive signs and to discontinue handling certain competitive oils in 1946 or 1947 (when he was buying under a 3-C sales contract containing an entire requirements clause) but not thereafter. [R. 1016, 1024.]

Colmery (3-C) did not testify to any inspection or policing or request not to handle competitive oils or accessories or advertise them even during the period when his 3-C contract was on an entire requirements basis. He did testify to handling competitive products at that time. [R. 1199-1200.]

Strable (3-C)—no pertinent testimony.

Ogburn (3-C) testified a man named Froman inspected the station and signed a Form 205 which mentioned an unauthorized sign. [Ex. 22G; R. 316, 1359.] No one asked Ogburn to take the sign down, but Froman said that if Ogburn had the sign down he would have a clear record. [R. 1360.]

W. G. King, Jr., Richfield's vice president, testified that Froman was not a salesman but a "special retail representative" whose responsibilities are limited to visiting L. O. stations and inspecting the cleanliness of the premises and restrooms. If Froman did the acts testified to by Ogburn, it was outside his duties or authority. [R. 1709-11; Work Habits Special Retail Representatives; Ex. S; R. 491-2, 1711.]

former employees, agents and distributors of Richfield,[78]

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[78]*Nicholson,* assistant division manager for Arizona from 1941 to 1946, testified to instructions to L. O. operators. [R. 700-1.] He stated that he spoke only of L. O. stations, not independent stations. [R. 705.] On direct examination by the government he said: "There is a difference between the independent operator and leased out station . . . Of course, we encourage our L. O. operators to handle all of our approved accessories. The independent operators could generally do as they pleased." [R. 702.]

Cowan, who was a district salesman in Arizona from 1941 to 1945, and a commission agent in that state from 1945 to 1948, testified that he "could not assert any control over the dealer who might have been contracted with under the 337" [R. 711], that "it was really an impossibility to tell him what to do, so we appealed to his sense of good judgment" to use Richfield products and to "police the place" [R. 715]; and there was nothing Cowan could do about the failure of a dealer to do these things. [R. 715.]

Bradford, the Portland Branch Manager from 1941 to 1946, took pictures of dealer stations at the time he sent in requisitions for painting such stations. [R. 1058.] On some occasions he asked the dealer to remove competitive products in order to get a painting agreement. [R. 1058.] (Bradford's testimony on cross-examination denied this. [R. 1086.]) When the dealer took down the signs, Bradford did not insist on the dealer's agreeing to take out all competitive products and the dealer continued to sell competitive products if he felt so inclined. [R. 1086.] ". . . there was no instruction as far as permitting the man that owns that station to not put up a sign. I didn't have anything to say as to what he would put up or what he couldn't do. It was my job to sell him on the idea to take these things down, and if I couldn't do that, why, he kept on handling the product. But at the time the paint requisitions went in, why, I never had any trouble with the dealers, for them to take the signs down long enough for me to take a photograph, at least." [R. 1062-3.] When the competitive oil salesmen come around the signs went up again. [R. 1092.] Bradford never refused to take on a 337 account who said that he wanted to handle competitive oils or competitive TBA. [R. 1088.]

Bradford testified that there was a difference in dealing with the L. O. operators and the independent dealers. The dealer accounts were handled by salesmen and the L. O.'s by merchandisers. [R. 1100.] If an L. O. operator did not conform to handling Richfield approved automotive accessories, he was eventually checked out. [R. 1073.] As to the dealer stations, "We all knew we had to sell that to the dealer account." [R. 1072.]

Bradford held meetings every morning with the salesmen and merchandisers. [R. 1067-8.] As a result of these discussions,

Bradford identified various L. O. operators who were checked out [R. 1073-7]; but he did not testify to any cessation of deliveries to or termination of the sales contract of any independent dealer resulting from the handling or display of competitive merchandise.

Scollard, salesman at Portland in 1945-1946, testified that he removed signs from two dealer stations in 1946. [R. 1137-8.] Both of these signs so removed belonged to Richfield and the dealer had pasted competitor's signs over them. [R. 1143-4.] Scollard attended the meetings presided over by Bradford, the branch manager, and which were attended by both salesmen and merchandisers. [R. 1137.] He testified that merchandisers had nothing to do with the dealer stations; and salesmen had nothing to do with the L. O. stations. [R. 1142.] He testified that Bradford explained the policy to be that "Richfield service stations" were to handle nothing but approved merchandise. [R. 1138.] It is clear from Bradford's testimony [R. 1073], and from Scollard's testimony [R. 1139-41], that Bradford's statement concerning policy related only to L. O. stations.

Duarte was not an employee of Richfield but was a commission bulk plant agent and TBA distributor in San Lorenzo, California, from September, 1938, to October, 1945. Duarte's testimony with reference to inspection, policing and supervision pertained only to the L. O. stations. His testimony must be analyzed with care, however, because of his indiscriminate use, while testifying, of the word "dealer" to refer to independent dealers and to L. O. operators. Nevertheless, Duarte knew the difference between an L. O. station and an independent dealer station and gave a vivid description of the distinction. He said: "As far as I understand it, an L-O unit is a leased out Richfield station, and an independent station is that a dealer owns his building, his pumps, and the property. He is an independent dealer. An L-O unit, as far as I was concerned, was leased from a property owner, where Richfield wrote a long contract and, then, in turn, leased to a dealer [*sic*], but Richfield held the main lease on it for 10 years, 20 years, whatever it was." [R. 728.] He said further: "(the dealer) owned the station and he owned the property, and he was in business for himself. Richfield's L. O. units, they worked for Richfield." [R. 731.] (Duarte's testimony concerning painting agreements is discussed in Footnote 81 hereinafter.)

Jones was a commission agent in Hawthorne and Santa Monica for Richfield in 1944 and was later a TBA distributor in a different

and salesmen for competitors.[79]

King denied any effort by Richfield to control operations of 3-C or 337 dealers. [R. 663, 1634-5, 1687-8.] He described the sales efforts of the salesmen who con-

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area from 1945 to 1949. He did not testify to any matters pertaining to inspection, policing or supervision of dealer stations. As TBA distributor he was confined to selling authorized accessories [R. 736-7]; he tried to sell products to everybody he could [R. 736-7]; if the operator of an L. O. station was handling competitive TBA, Jones discussed the matter with Richfield's merchandiser and it would be up to the merchandiser to handle it from there on—Jones couldn't do anything about it. [R. 740.] Jones knew the difference between an L. O. station and an independent dealer station; the merchandisers have contact only with L. O. stations and not independent stations. All of his conversations with merchandisers re TBA related only to L. O. stations. [R. 744-5.]

Gates (former TBA distributor) was required to submit reports to Richfield of his sales of TBA. [R. 1156.] He discussed TBA sales at morning meetings in Portland, conducted by Bradford. [R. 1156.] Bradford discussed the twenty-four hour termination clause and said he was going to put over the TBA program "if he had to check out every operator in the City of Portland." [R. 1157.] This statement referred only to L. O. operators. [R. 1173.] 80% of Gates' sales were to stations which did not handle Richfield products. If he was unsuccessful in selling to stations handling Richfield products he made no effort to instruct them or tell them they had to buy or they would be dispossessed, but merely fulfilled the capacity of a salesman. [R. 1172.]

Pitts (former TBA distributor), gave no pertinent testimony. [R. 993-8.]

Redding (former TBA distributor in San Diego from 1946 to 1948), did not testify to any matters pertinent to inspection, policing or supervision. [R. 681-94.]

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[79]Twenty-two of the twenty-five competitor witnesses testified only concerning L. O. stations. The other three competitor witnesses, Ellis, Turner and Cleveland, did not testify to any matters which could be characterized as supervision, policing or inspection of dealer stations, either 337 or 3-C.

tacted the independent dealers and emphasized the latters' freedom of choice.[80]

3. Findings re Cancellation of Contracts.

Although the complaint alleged that Richfield has required the dealers to adhere to exclusive dealing contracts by threats, both express and implied, that it will cancel the sales contract or lease [Compl. par. 20; R. 7-8], there is no testimony of any such threat of cancellation to any 337 or 3-C dealer.[81] The District Court made no finding that any such threat occurred.

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[80]On examination by the government, King testified, ". . . it would be only natural that if he [the salesman] finds that the dealer is buying competitive products, he is going to endeavor to sell them on the merits of our products. . . . it is quite possible in calling on the account he is going to take stock of what the competitors are able to sell him and endeavor to displace those products, if he can, through interesting him in the merits of our products. . . . Well, we should be delighted if the dealer would see fit to handle our products entirely. Naturally, that is the objective of our salesmen from the sales standpoint, but certainly it is entirely up to the dealer to do so. In other words, the dealer, he is the last word in that respect as to whether or not he is going to buy our products or somebody else's products." [R. 1688.]

King testified further that Richfield does not solicit the business of a dealer on the basis of any agreement or understanding that he buy all of his requirements of gasoline or other petroleum products from Richfield; and the instructions concerning the manner of fixing the quantities to be inserted in contracts result in the dealer's not being permitted to obligate himself to buy his entire requirements. [R. 1620-21, 1627, 1638, 1644, 1707-8.]

[81]*Duarte*, the former commission agent and TBA distributor (until 1945), was the only witness other than King whose testimony even mentioned cancellation of dealers' contracts.

Duarte testified with respect to independent dealers, "If they didn't do it the way Richfield wanted them to, they would cancel out the lease. . . . They would cancel out his paint contract and he would be all through buying Richfield products . . . in that particular station." [R. 731-2.] However, Duarte gave no instance of any such cancellation and the only instance he gave

Likewise the District Court made no finding of the cancellation of contracts by Richfield because of the handling by the independent dealers of competitive oils or greases or non-approved automotive accessories or because of the display or advertising by the independent dealers of any of such competitive products; nor was there any testimony whatsoever of any such cancellation.

The only finding pertaining to the cancellation of contracts is contained in Finding 28[82] which deals with Rich-

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concerning even a threat of cancellation was a request to Duarte by a Richfield salesman to contact dealer Koenen "to see that he got rid of his competitive oil, that Richfield Oil Company had painted his unit, and if he did not get rid of it they would cancel his lease." Duarte did not testify to having told Koenen of the suggested cancellation. [R. 724.]

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[82]"28. Beginning in or about June 1938, with the purpose and intent of further effectuating and enforcing the exclusive dealing provisions of the written and oral contracts between Richfield and the independent operators of the L-O, 3-C dealer, and 337 dealer service stations, Richfield adopted the policy of refusing to sell gasoline to the independent operator of any service station handling or selling gasoline competitive to Richfield gasoline. Pursuant to this policy Richfield withdrew from all split pump accounts and refused to sell gasoline to any independent operator of the L-O, 3-C dealer, and 337 dealer stations except on the oral condition, understanding, and agreement that the independent operator purchase all of his requirements of gasoline from Richfield. Richfield has not, in fact, since said time sold or supplied gasoline to any independent operator who has not in fact purchased all of his gasoline requirements from Richfield regardless of the provisions of any written sales contract with said independent operator. When the independent operator wished to operate his station as a split pump station, Richfield terminated all supply arrangements with such operators. Said policy has had the effect, as intended by Richfield, of preventing the independent operator of an L-O, 3-C dealer, or 337 dealer station from handling or selling gasoline competitive to Richfield at said stations and of preventing the operator of the 3-C or 337 dealer stations from purchasing any quantities of gasoline above the specified minimums designated in the written forms of sales contracts (plaintiff's exhibits 3B, 4C, 5, 5B, 5D and 5G), from any manufacturer or supplier of gasoline other than Richfield." [R. 154.]

field's "policy" concerning split pump accounts. Since the finding is true in part, its error, though pervasive, is subtle. The truth is limited to the fact that in June, 1938, Richfield instructed its Division Managers to discontinue all split pump resale accounts [Ex. 9, R. 284, 658], pursuant to which instructions Richfield withdrew from some forty or fifty split pump accounts which it then had, but without any public announcement to the trade in connection with such withdrawal. [R. 1635-6.] A split pump station is one which handles in different pumps and at the same time the gasoline of more than one supplier.

The remainder of Finding 28 is clearly erroneous. Particularly is it erroneous in its implication that either the policy or purpose evidenced by the June, 1938 letter or any of the acts taken in pursuance thereof continued to the time of trial or to a time reasonably proximate thereto. Each of the several findings in Finding 28 which follows the reference to the June, 1938 letter can thus be demonstrated to be clearly erroneous:

(a) The finding states: "Pursuant to this policy Richfield withdrew from all split pump accounts and refused to sell gasoline to any independent operator of the L-O, 3-C dealer, and 337 dealer stations except on the oral condition, understanding, and agreement that the independent operator purchase all of his requirements of gasoline from Richfield."

The only evidence in the entire record of split-pump accounts from which Richfield withdrew is that pertaining to the forty or fifty split-pump accounts from which Richfield withdrew in 1938. There is no testimony or evidence whatsoever of Richfield's withdrawal from any split-pump account during a period of twelve years preceding the

trial in 1951; and with the sole exception of the McRae incident in 1941, there is no testimony or evidence that during such twelve-year period Richfield refused to sell gasoline to any dealer who desired to purchase the same from Richfield on a split-pump basis. All of the testimony in the entire record pertaining to split-pump operations or the withdrawal from split-pump accounts, is referred to in the accompanying footnote.[83]

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[83](a) *Dealers:*

McRae (337 and L. O.). Within thirty days from the time McRae "signed the lease with Richfield," he told two Richfield employees that he wanted to handle two types of gasoline, Standard and Richfield; and was told by them that he would have to handle either Richfield or Standard. [R. 1226.]

In referring to the time he "signed the lease with Richfield," McRae did not identify whether he meant the L. O. lease on the station made with Richfield in 1939 [R. 1224] or the 337 sales contract and painting agreement dated December 2, 1941, made with Richfield within two weeks from the time McRae obtained the master lease on the same station from the property owner. [R. 1224-5.]

Moore, Colmery, Strable and *Ogburn*—no pertinent testimony.

(b) *Former Employees, Agents and Distributors:*

S. L. Nicholson (assistant manager Arizona until 1946), testified that during the time he was in Arizona he thought Richfield's policy to be that of not having split-pumps. He did not testify that Richfield ceased delivery to any dealer who went split-pump. Conversely, he testified to two instances in 1941 when dealers solicited Richfield for gasoline for less than the entire number of pumps in the station and Richfield "took on the account." He said these two accounts were later converted to a "100% account," but did not state that any coercive tactics brought about such result. [R. 704-5.]

E. J. Bradford (district supervisor in Oregon, Washington and Idaho in 1937 and branch manager in Portland from 1937 to 1946), testified: In 1937 the "entire effort" was that the stations be on a 100% basis. [R. 1039.] While in Portland his instructions were that *3-C dealers* had to be 100%. [R. 1047.] (This testimony pertained to a time when the 3-C sales contracts provided for the dealers' "entire requirements.") In negotiating a 337 contract, "the quantity would depend on what he (the

(b) Finding 28 states further: "When the independent operator wished to operate his station as a split pump station, Richfield terminated all supply arrangements with such operators."

This finding has no support whatsoever in the record as to any matter or fact occurring after 1938. In the subsequent twelve years before the trial, with the exception of the McRae incident, no 337 or 3-C dealer has ever as much as indicated to Richfield a desire to operate his station as a split-pump station; and Richfield has not terminated its supply arrangement with any dealer because of the existence of a split-pump operation or "wish" by the dealer to so operate.

(c) Next follows the specious portion of Finding 28 that "Richfield has not, in fact, since said time [1938] sold or supplied gasoline to any independent operator who has not, in fact, purchased all of his gasoline requirements from Richfield regardless of the provisions of any written sales contract with said independent operator."

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dealer) could sell. We would approach the 100% basis as near as we could." [R. 1088.] Richfield "lost accounts right and left"; but not while Bradford was branch manager in Portland did an independent account with whom Richfield had a contract to sell gasoline displace Richfield gasoline in less than all of the pumps. [R. 1091-2.]

Scollard and *Green* (salesmen), *Duarte* and *Jones* (bulk plant commission agents), *Gates, Pitts* and *Redding* (TBA distributors)—no pertinent testimony.

(c) *Current Richfield Representative:*

The testimony concerning split-pumps of *W. G. King, Jr.*, Richfield's vice president in charge of marketing, is summarized in the Statement on pages 26 to 28 of this Brief and will not be repeated here.

(d) *Competitor Witnesses:*

No pertinent testimony.

The reference to "since said time" is intended to be the connecting link between the June, 1938 letter and the trial in 1951. Such statement above quoted, true in itself, is nevertheless false in its implication that it proves or supports (1) the remaining portion of Finding 28 that "the policy has had the effect, as intended by Richfield, of preventing the independent operator of an L.O., 3-C dealer, or 337 dealer station from handling or selling gasoline competitive to Richfield at said stations";[84] and (2) that the "policy" enunciated by the 1938 letter continued from 1938 to the time of the trial.

Neither of such implications can be supported by the record.

First. It is true that while a majority of the 337 and 3-C dealers freely handled, displayed and sold competitive oils and automotive accessories, none of such stations were split pump in the sense that any of them handled competitive gasoline at the same time it was buying gasoline from Richfield. [R. 1639, 1678.]

But there is no showing whatsoever that even this limited confinement by the dealers to the handling of Richfield gasoline resulted from Richfield's "preventing" them from handling other gasoline. On the contrary it appears from the entire evidence that the action of the dealers in limiting themselves to the gasoline of one supplier at a time was purely voluntary on their part and did not result from any actions of Richfield, coercive or otherwise. None of the government dealer witnesses, except McRae, testified of a desire to become split pump; and no competitor selling gasoline was even called by the govern-

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[84]Here is another instance of indiscriminate grouping together of the L. O. and dealer stations, regardless of the radically different testimony relating to each.

ment as a witness. The evidence is uncontradicted that the overwhelming majority (in excess of 98%) of present day service station dealers prefer to handle at one time the products of a single supplier [R. 1636-9]; that consistent with such desire, when a dealer wanted to handle a different gasoline, he completely discontinued handling Richfield gasoline and replaced it entirely with a competitor's gasoline, whether the dealer's written contract had expired or was still in existence [R. 1626-7, 1631, 1639, 1676-8]; that of the dealer accounts lost by Richfield, approximately 80% were lost prior to the expiration of the sales contract. [Ex. X; R. 515, 1762.] This appears to be the situation envisioned by the following portion of the *Standard Oil Company* decision:

> "If in fact it is economically desirable for service stations to confine themselves to the sale of the petroleum products of a single supplier, they will continue to do so though not bound by contract, * * *." (337 U. S. at 313, 314; 93 L. Ed. at 1386.)

The fallacy in the District Court's finding is in its assumption that because Richfield ceased selling gasoline to certain dealers in 1938, other dealers who bought gasoline from Richfield during the succeeding twelve-year period were "prevented" or "coerced" from buying competitive gasolines.[85] Not only was there no showing of any coercive acts to compel the dealers to buy Richfield gaso-

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[85]A similar fallacy was discussed in *United States v. J. I. Case Co.*, 101 Fed. Supp. 856, 864-5 (D. C. Minn., 1951); where there was present the culpable aspect, not here involved, of current coercive practices by the defendant against certain dealers to require them to give up competing lines as a condition to obtaining a supply contract or renewing an existing one. See Footnote 72 hereinabove.

line during the period 1939 to 1951; but there was not even a showing that the dealers who did buy gasoline from Richfield during the intervening twelve-year period before the trial had ever heard of the policy expressed in the June, 1938 letter or had any knowledge of Richfield's withdrawal from the 40 to 50 accounts in 1938. Note that Richfield's withdrawal from those accounts at that time was without any public announcement to the trade. [R. 1635-6.][86]

Second. There is no showing, as implied in Finding 28, that there continued from 1938 to the time of trial the "policy" of the 1938 letter withdrawing from split pump accounts. The government did not show any instance of a withdrawal occurring after 1938. Richfield's showing, while not of a positive rescission of such 1938

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[86]If it be assumed *arguendo* that such withdrawal in 1938 could be deemed coercive as to those 40 to 50 affected accounts, the same could not conceivably be deemed coercive as to other dealers who did not have knowledge thereof.

Compare these facts with the situation in *Carter Carburetor Corporation v. Federal Trade Commission*, 112 F. 2d 722, 726 (C. C. A. 8, 1940), where the defendant mailed to all of its distributors and service stations a general bulletin notifying them that if they took on a new carburetor line, Carter's preferential discount, service information and contract would be discontinued. The Circuit Court said:

> "It was made perfectly clear to all service stations that their preferential discount would be available only on condition that they did not carry or take on a new competing line. Under these circumstances it is immaterial that those who handled petitioner's products were not obliged to affirmatively promise in express terms not to handle goods of Carter's competitors. The condition against handling the goods of competitors was made as fully effective as though it had been written in and affirmatively agreed to in express terms in the contracts." (112 F. 2d 722, 732.)

policy, was that the 1938 instructions became meaningless due to the change in buying practices of the independent dealers. See Statement, pages 26 to 28 hereinabove.

Richfield readily acknowledged a current policy of an entirely different nature, not of the withdrawal from split pump accounts, but of a determination not to *solicit* the business of *those particular dealers* who operate the less than 2% of all service stations operating on a split pump basis. Richfield's reason for such selectivity in its solicitation included the fact that split pump stations are not deemed by it desirable for its business because of their facilities, type of service and manner of operation. [R. 655, 1638.] Solicitation of business on this basis is a wholly valid exercise of Richfield's right to the selection of its customers.[87] It does not involve any coercive practices whatsoever. Such manner of selection of customers is not in any sense inconsistent with the fact that the business which is sought by Richfield is solicited on a specified quantity and not on an entire requirements basis. [R. 1620, 1627, 1638, 1644.]

Accordingly, the concluding portion of Finding 28 to the effect that the dealers have been *prevented* from handling or selling gasoline competitive to Richfield or from purchasing from competitors of Richfield quantities of gasoline above the specified minimums designated in their written sales contracts is also clearly erroneous.

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[87]15 U. S. C. A., Section 13 (Section 2 of the Clayton Act), provides, in part:

> "That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: . . ."

4. Findings re Painting Agreements.

Finding 26 relating to painting agreements is clearly erroneous in many respects. The finding states, in part, "The purpose and intended effect of the painting agreement is to secure an exclusive Richfield outlet, * * *." The evidence does not support this finding either as to purpose or effect. Both Bradford, the government witness, and King, Richfield's Vice President, testified that the painting of service stations is a practice which has been developed by competition; that various companies paint the dealers' stations in their identifying colors, and that the dealers desire to have their stations painted for advertising value and for the preservation of their stations. In order to obtain the business of independent dealers, it was necessary for Richfield to meet competition and similarly paint stations. [Bradford, R. 1083-4; King, R. 1622.] Richfield's reason for the provision in the painting agreement providing for reimbursement for painting expenses under said conditions was explained by King as follows: The average cost of painting a station runs from $500 or $600 to as high as $1,200 or $1,500. "In the event the dealer should break his contract to purchase the fixed quantity of gasoline that he has agreed to, or, in other words, if he stops buying our gasoline this contract gives us the right to collect for the cost of the paint job." If the dealer fulfills his contract to purchase the fixed quantity, "we consider our paint costs have been amortized." [R. 1624-5.]

The entire record contains testimony of only three instances which occurred during the entire fourteen-year period of Richfield's existence of the use of painting or of painting agreements in connection with purchases by an independent dealer of Richfield petroleum products

either exclusively or in greater quantities than his prior purchases; and all of these instances occurred prior to 1946.[88]

That is the sum total of the testimony to support the finding that "no painting agreement is entered into by Richfield except upon the oral understanding that the independent operator of the 337 dealer service station will purchase his entire requirements of petroleum products and automotive accessories from or through Richfield." [R. 153.]

Finding 26 also states that the obligation of the dealer to pay for the cost of painting in the event the sales contract is terminated by him prior to the expiration of its term was intended to and had the effect of compelling the dealer to purchase all of his requirements of petroleum products and automotive accessories from or through Richfield. This is contrary to the undisputed evidence. Some 75% of the dealers handle and display competitive oils and accessories [R. 1706-7] and the government did not prove the identity of one dealer who handled Richfield products exclusively. Proof that the existence of a painting agreement with a dealer did not have the effect of compelling his continued purchase of gasoline from Richfield is found in the undisputed fact that of 407 dealer accounts lost by Richfield prior to the expiration of the dealers' contracts, the dealers of 303 of them (representing 74% of the total) did have paint-

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[88]McRae, see Footnote 74.

Bradford testified concerning the Kawalski incident. See Footnote 76. See also Footnote 78.

Duarte testified concerning the Koenen incident. See Footnote 81.

ing agreements in effect providing for their repayment to Richfield of the cost of painting because of such discontinuance. [Ex. X; R. 515, 1762.] Furthermore, Richfield did not enter into a painting agreement with each of the 337 dealers at the time it made a sales contract with him. Of the 1361 sales contracts in effect with 337 dealers as of December 31, 1950, only 853 of them were made concurrently with painting agreements. [R. 1621-2; Ex. 26-A, R. 335-6, 1540.]

5. Findings re Effect on Competitors.

The Court found that the "oral" and written sales contracts and painting agreements and 3-C leases had the effect of shutting out all competition for the petroleum products and automotive accessories business of the 337 and 3-C dealers and denied to manufacturers and suppliers of competitive products access thereto. [Findings 26, 45 and 46; R. 153, 161, 162.] There is no evidentiary support for these findings. All but three of the twenty-five competitor witnesses called by the government testified solely of their inability to sell or difficulties in the sale of their products to L. O. operators and did not testify even to efforts to sell to independent dealers. The testimony of the other three competitor witnesses does not support the finding.[89] No competitor selling gasoline was even called as a witness.

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[89] *Ellis*, the Penzoil salesman, testified of efforts to sell L. O. operators. The only non-L. O. operator to whom he attempted to sell was Colmery, a 3-C dealer, and Ellis' efforts to sell to Colmery were during the time when Colmery had "an entire requirements" form of 3-C contract which Colmery refused to change until Richfield gave him a thirty-day termination privilege. [R. 933-4, 942-4,

That is all the testimony there is in the entire record concerning the effect on competitors of Richfield's contracts or practices with 337 and 3-C dealers.

6. Findings re Effect on Dealers.

The District Court found that the "oral" and written agreements prevented the 337 and 3-C dealers from dealing with competitive suppliers and denied such dealers access to competitive products. [Findings 39, 47 and 48; R. 158, 162-3.] There is no evidentiary support for these findings insofar as they pertain to any of the 337 or 3-C stations. All evidence which bears upon this matter has been discussed hereinabove.

The portion of the District Court's Opinion relating to the dealer stations contains many purported statements of fact some of which are without evidentiary support and are contrary to the evidence. Others can only be supported by a misapplication to the dealer stations of testimony

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963-4, 1199-1200.] Ellis also testified that if he did sell to Richfield accounts, it was on a "basis of a hidden capacity, no display, no signs and what have you, if I did make a sale." [R. 963.] This testimony of no display of Penzoil signs in Ellis' sales territory was refuted by photographs taken at the time of the trial of 337 and 3-C stations, located in Ellis' territory. [R. 928, 1783-6.] [Ex. AD, R. 521-34, 1785.]

Turner. The only non-L. O. station referred to by Turner was a 3-C station run by Mrs. Johnson. Turner talked to Mrs. Johnson about purchasing Christiansen Oil Co.'s products and she said that she *would continue* to buy. [R. 1504.]

Cleveland, another salesman for Christiansen Oil Company, testified that Ogburn (in a 3-C station) did not display Christiansen's products but that he did purchase them. [R. 1491-3.]

which patently related only to the L. O. stations and their operators. Illustrative are the following:

(a) The Opinion, in referring to the painting agreement, states: "And Richfield retains the right to cause the removal of any signs placed in violation of this clause." [R. 91.] There is no provision in any of the successive forms of painting agreements [Exs. 5-A, 5-C, 5-E and 5-F; R. 269, 271, 274-5, 567] giving Richfield any such right; nor is there any evidence that Richfield removed from any independent stations any signs other than those belonging to and furnished by it. [R. 1143-4.]

(b) The Opinion states: "The painting agreement is obviously intended to secure an exclusive outlet under the guise of a painting agreement. . . . [It] could have but *one object,—i. e.,* to shut out all competition. And, in reality, that was *the effect* of the arrangement." (Emphasis by Court.) [R. 91-2.] If anything is clear from the evidence in this case, it is that in reality the painting agreement did not shut out any competition at all. There was undisputed proof that 75% of all dealers handled and displayed competitive products other than gasoline. If competitors for the sale of gasoline were locked out or foreclosed from competition, one might well imagine that the government, having called twenty-five competitor witnesses who testified to other products in relation to the L. O. stations, could have produced one competitor witness to testify as to gasoline in relation to the dealer stations.

(c) The Opinion states with reference to the original split-pump policy of 1938: "And it is quite evident that in one form or another, the policy has been enforced, and that the moment gasoline of another concern was handled by any of the operators on these leases,—as one of their

own witnesses put it,—Richfield 'was no longer interested in the station,' and terminated their relationship." [R. 92.] No witness so testified.[90]

Further, the statement above quoted is unwarranted by anything in the record. There is no evidence of any instance since 1938 of any termination by Richfield of its "relationship" with any dealer until after he had completely discontinued handling Richfield gasoline.

(d) The Opinion states: "In truth, there is evidence that the policy of the Company was that if 'any dealer' refused to interest himself in Richfield sponsored TBA products, 'then it's a new dealer,'—*i. e.*, the instructions were to cancel the arrangement, whatever it was." [R. 92-3.] In the entire record, there is no testimony of such nature relating to any 337 and 3-C dealer. This statement of the Court appears to be a misapplication of testimony given by the government witness Duarte, who used the word "dealer" indiscriminately to refer both to an independent dealer and an L. O. operator. (See Footnote 78 hereinabove) Such statement of Duarte's was: "We were supposed to deliver the products to the Richfield dealer and if he didn't want to buy these products we were

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[90]The aforesaid language appears to be a paraphrase of the Court's own statement to counsel during the course of the trial: "On the other hand, you can argue from the same facts that that ceased, *that you simply were not interested for reasons of your own in split-pump accounts and abandoned them,* and what they did afterwards should be determined upon an independent basis." (Emphasis supplied.) [R. 1552.]

to put in a new dealer that would. That was their policy." [R. 721.] But it is beyond cavil that in such statement Duarte referred not to independent dealers but only to the operators of L. O. stations. He knew the difference between an L. O. station and an independent station.[91] Immediately preceding his testimony above quoted, Duarte said: "As far as I can remember we were told to sell all Richfield outlets, but mostly the Richfield Company units; that we couldn't make any independent dealer, which he owned his own station and pumps, buy the tires, batteries and accessories because he didn't have to, . . ." [R. 721.] "That the Company units were the ones that Richfield really wanted to buy TBA, and they had to buy it." [R. 721.]

Finally, the Opinion states that these instruments ". . . in effect, are *requirement* contracts, although not so denominated, . . ." (Emphasis by Court.) [R. 93.]

The District Court's decision, unless disavowed, appears to establish the law that a sales contract providing for a

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[91]Duarte said: "As far as I understand it, an L-O unit is a leased out Richfield station, and an independent station is that a dealer owns his building, his pumps, and the property. He is an independent dealer. An L-O unit, as far as I was concerned, was leased from a property owner, where Richfield wrote a long contract and, then, in turn, leased to a dealer, but Richfield held the main lease on it for 10 years, 20 years, whatever it was." [R. 728.]

He said further: "That is the difference, independent. He owned the station and he owned the property, and he was in business for himself. Richfield's L-O units, they worked for Richfield." [R. 731.]

specified quantity of products substantially less than the purchaser's anticipated requirements is an illegal "exclusive dealing" contract when used, on occasion, in connection with a collateral agreement under which the purchaser, who has received without charge the painting of his place of business, agrees to repay to the seller the cost of such painting in the event the purchaser fails to purchase the specified quantity. The District Court's decision would likewise declare such a sales contract to be an illegal "exclusive dealing" contract when used in connection with a lease by the dealer to the supplier and a sublease back to the dealer under which instruments the supplier has the right to retain the lease and terminate the sublease and sales contract if the dealer fails to purchase the specified quantity agreed to. We submit that such an interpretation of the anti-trust laws cannot reasonably be justified.

Giving the greatest weight to all of the testimony of the government's witnesses concerning Richfield's relationships to the dealer stations, none of the acts of Richfield's representatives can be considered to be coercive in any respect or considered other than legitimate efforts at persuasive salesmanship of the nature approved in *Ford Motor Co. v. United States,* 335 U. S. 303, 316, 318; 93 L. Ed. 24, 35, 36 (1948).

B. If It Be Determined on This Appeal That Richfield's Arrangements With the 337 Dealers or With the 3-C Dealers Could Be Deemed to Be Exclusive Dealing or Requirements Contracts, Nevertheless There Are No Facts Found by the District Court Upon Which It Could Properly Base Its Conclusion That the Contracts Are Unreasonable Under Section 1 of the Sherman Act or That the Requirements of the Qualifying Clause of Section 3 of the Clayton Act Have Been Met.

SHERMAN ACT, SECTION 1.

If it could be determined that Richfield's contracts with the 337 and 3-C dealers are requirements contracts in the view thereof taken by the District Court in its Opinion [R. 93], such contracts, nevertheless, may not be determined to be unreasonable restraints of trade under Section 1 of the Sherman Act in the absence of findings supported by facts relevant to the various tests and factors which must be examined in the application of the rule of reason.

All of the discussion concerning the determination of unreasonableness of restraints under Section 1 of the Sherman Act contained on pages 94 to 104 of this Brief in Part I-B is equally applicable here and will not be repeated.

The government submitted no proof of the various factors there enumerated which are relevant to the problem of unreasonableness. The District Court determined illegality under Section 1 of the Sherman Act without proof by the government that any competitor was unable to sell products to any 337 or 3-C dealer. Particularly absent was proof under the doctrine of *United States v. Columbia Steel Co.*, 334 U. S. 495, 524; 92 L. Ed. 1533,

1552 (1948) that Richfield's activities had the effect of unreasonably restricting the opportunities of Richfield's competitors to market their products. The District Court denied Richfield's motion that it make findings of those material facts enumerated in Richfield's Assignments of Error II, 3(e) to 3(p), inclusive [R. 211-2], all of which proposed findings are supported by uncontradicted evidence, and which, if made, would require the conclusion that there has been no unreasonable restraint of trade even if Richfield's contracts with the 337 and 3-C dealers could be deemed to be exclusive dealing or requirements contracts.

CLAYTON ACT, SECTION 3.

Under the rule of *Standard Oil Company of California v. United States,* 337 U. S. 293, 313, 314; 93 L. Ed. 1371, 1385-6 (1949), no showing of substantiality has been made as to the 337 or the 3-C stations.

The 337 Stations: For the year 1950 the gasoline sold by Richfield to the 337 stations constituted 1.14% of the total gasoline manufactured and available for sale in the Western area [Ex. Z; R. 517, 1768]; and constituted 1.33% of the volume of taxable sales of motor vehicle fuel by all companies in the area [Ex. M-5; R. 437-40, 1559]; and constituted 2.03% of the total volume sold by all companies to all stations. For the year 1948, the 337 stations constituted 3.08% of the total service stations in the area. [Ex. M-4; R. 432-6, 1557.]

The 3-C Stations: For the year 1950 the gasoline sold by Richfield to the 3-C stations constituted 0.34% of the total gasoline manufactured and available for sale in the Western area [Ex. Z; R. 517, 1768]; and constituted

0.40% of the volume of taxable sales of motor vehicle fuel by all companies in the area [Ex. M-5; R. 437-40, 1559]; and constituted 0.63% of the total volume sold by all companies to all stations. For the year 1948, the 3-C stations constituted 0.70% of the total service stations in the area. [Ex. M-4; R. 432-6, 1557.]

The affected share or proportion of the line of commerce is not substantial. (*B. S. Pearsall Butter Co. v. Federal Trade Commission*, 292 Fed. 720 (C. C. A. 7, 1923).)

Conclusion.

As to the L. O. stations, there is no dispute of fact. We respectfully submit that the relationship of Richfield to the L. O. operators is such that the restriction against exclusive dealing is not cognizable under either the Clayton or Sherman Act. Even if the relationship were not such, nevertheless the facts here presented fail to show either unreasonableness under Section 1 of the Sherman Act or proof sufficient to meet the requisites of the qualifying clause of Section 3 of the Clayton Act.

Richfield's contracts with the dealer stations are not exclusive dealing or requirement contracts but are contracts for the sale of specified quantities of petroleum products substantially less than the dealers' anticipated requirements, and thus are not unlawful restraints under Section 1 of the Sherman Act nor are they within the class of contracts affected by Section 3 of the Clayton Act.

All findings of oral contracts, agreements or understandings of exclusive dealing in Richfield's petroleum products or approved accessories and of a pattern of coercive practices on Richfield's part to require exclusive dealing agreements are clearly erroneous under Rule 52(a), F. R. C. P.

We respectfully submit that we have sustained each and every Assignment of Error and that the judgment appealed from should be reversed as to both types of stations.

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